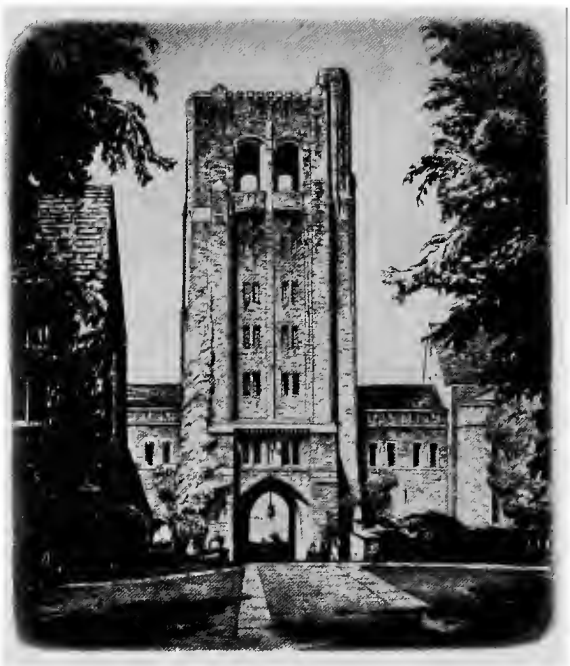

A TREATISE

ON

THE LAW

OF

CONDITIONAL SALES

OF

PERSONAL PROPERTY

BY

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CINCINNATI

ROBERT CLARKE & CO

1888

PREFACE.

It has been my object, in producing this work, to present a comparatively modern branch of the law in a new way; that of bringing together, for more ready reference, cases similar in point of law and fact. The exact language of the courts has been, in many instances, used in preference to that of the author, with the view of making the text not only authoritatively correct, but brief and concise. The work is submitted to the judgment of a candid and busy profession, with the hope that whatever demerits may mar the execution of the undertaking, will be more than counterbalanced by the advantages incident to the plan adopted.

CHARLES R. MILLER.

CANTON, O., *October*, 1888.

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PART I.

GENERAL REQUISITES OF CONTRACTS OF SALE.

CHAPTER I.

ESSENTIAL ELEMENTS OF CONTRACT.

ARTICLE 1.—DEFINITION AND ELEMENTS OF SALE. §§ 1–6.

CHAPTER II.

ELEMENTS REQUIRED BY STATUTE.

ARTICLE 2.—STATUTE OF FRAUDS. §§ 7–16.

CONDITIONAL SALES.

CHAPTER I.

ESSENTIAL ELEMENTS OF CONTRACT.

ARTICLE 1.—DEFINITION AND ELEMENTS OF SALE.

§ 1. Definition.
§ 2. Competent Parties.
§ 3. Mutual Assent.
§ 4. Subject of Sale.
§ 5. Consideration.
§ 6. Transfer of Property.

§ 1. **Definition.** Whether a sale is absolute or conditional, the same elements are essential, for in the latter class of sales the conditions invariably apply to some of the essential elements of an absolute sale. The definition of a sale and its essential elements are therefore material to the proper consideration of the subject of conditional sales.

A sale may be defined to be a mutual assent by competent parties to the transfer of property for a determined consideration to be paid therefor.[1] The essential elements of a contract of sale are therefore—competent parties; mutual assent; property the subject of sale, the transfer thereof, and the consideration to be paid therefor.

(1) Wittowsky *v.* Wasson, 71 N. C. 451; Martin *v.* Adams, 104 Mass. 262; Smith *v.* Weaver, 90 Ill. 392; Williams *v.* Berry, 8 How. (U. S.) 544; Mackaness *v.* Long, 85 Penn. St. 158; Massey *v.* State, 74 Ind. 368.

§ 2. **Competent Parties.** As a general principle, no one can acquire a better title to property than

that of his vendor, however innocent he may be in his purchase.[1] Nor can title be acquired in property which has been lost or stolen; and the owner may repossess himself of the same if found in the possession of the finder, thief, or their vendee.[2] Only the owner, his agent or legal representative, can give a valid title. Administrators or executors, officers of courts having jurisdiction, bailees, mortgagees, pledgees, or their assigns, are legal representatives, but can convey such title only as the original owner may have had.[3]

All persons competent to contract may buy. Disabilities, such as mental or legal, will not render the sale absolutely void, but voidable.[4] Disabilities may be permanent, as idiocy or insanity; or temporary, as intemperance, infancy, or coverture. But in many states the disability of coverture has been removed by statute, and married women are thereby authorized to contract as though feme soles.

(1) Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; Gilmore *v.* Newton, 9 Allen (Mass.), 171; Bearce *v.* Bowker, 115 Mass. 129; Moody *v.* Blake, 117 Mass. 23; Prime *v.* Cobb, 63 Me. 200; Bryant *v.* Whitcher, 52 N. H. 158; Curtis *v.* Cane, 32 Vt. 232; Williams *v.* Merle, 11 Wend. (N. Y.) 80; Klein *v.* Sebald, 89 Ill. 540; Wilson *v.* Crockett, 43 Mo. 218; McMahon *v.* Sloan, 12 Penn. St. 229.

(2) Hoffman *v.* Carow, 20 Wend. 21; 22 Wend. 285; Dame *v.* Baldwin, 8 Mass. 519; Gilmore *v.* Newton, 9 Allen (Mass.), 171; Heckle *v.* Lurvey, 101 Mass. 344; Rolland *v.* Gundy, 5 Ohio, 202; Curtis *v.* Cane, 32 Vt. 232; Pease *v.* Smith, 61 N. Y. 477; Brickenbridge *v.* McAffee, 54 Ind. 141; McGrew *v.* Broder, 14 Martin (La.), 17; Beazeley *v.* Mitchell, 9 Ala. 780.

(3) Symonds *v.* Hall, 37 Me. 354; Combs *v.* Gordon, 59 Me. 111; Bryant *v.* Whitcher 52 N. H. 158; Griffith *v.* Fowler, 18 Vt. 390; Sanborn *v.* Kittridge, 20 Vt. 640; Champney *v.* Smith, 15 Gray (Mass.), 512; Johnson *v.* Babcock, 8 Allen (Mass.), 583; Duffam *v.* Dean, 8 Cush. (Mass.) 41; Williams *v.* Miller, 16 Conn. 144; Bartholomew *v.* Warren, 32 Conn. 102; Stone *v.* Elberly, 1 Bay. (S. C.) 317; Homesley *v.* Hogue, 4 Jones L. (N. C.) 481; Avendale *v.* Morgan, 5 Sneed (Tenn.), 703; Boggs *v.* Fowler, 16 Cal. 559.

(4) Hovey *v.* Hovey, 55 Me. 256; Dennett *v.* Dennett, 44 N. H. 531; Mitchell *v.* Kingman, 5 Pick. 431; Rice *v.* Peet, 15 Johns. (N. Y.) 503; Grant *v.* Thompson, 4 Conn. 203; Shipman *v.* Horton, 17 Conn. 481; Vent *v.* Osgood, 19 Pick. 582; French *v.* Hickox, 8 Ohio, 214; Bates *v.* Ball, 72 Ill. 108.

§ 3. **Mutual Assent.** Assent of competent parties is an essential element of all contracts or agreements, and the assent must be both mutual and voluntary.[1] But this assent need not be expressed, but may be implied from the language, conversation, or conduct of the parties.[2]

If a proposition to sell be made by letter or telegram, its acceptance may be by the same means; and conditional propositions, to continue in force for a limited time, must be accepted before the expiration of the time designated.

(1) Lincoln *v.* Johnson, 43 Vt. 74; Darden *v.* Lovelace, 52 Ala. 290; Gardner *v.* Lane, 12 Allen (Mass.), 39; Butler *v.* Thompson, 92 U. S. 412.

(2) Peckerell *v.* Rose, 87 Ill. 263; Abbott *v.* Shephard, 48 N. H. 16; Bruce *v.* Bishop, 43 Vt. 161; Gowing *v.* Knowles, 118 Mass. 232; Jenness *v.* Iron Co., 53 Me. 20; Crocker *v.* New London R. Co., 24 Conn. 262; Carr *v.* Duval, 14 Pet. (U. S.) 77; Snow *v.* Miles, 3 Cliff. (U. S. C. C.) 608; Utley *v.* Donaldson, 94 U. S. 29. See also Plant Seed Co. *v.* Hall, 14 Kan. 553; Tuttle *v.* Love, 7 Johns. (N. Y.) 470; Tucker *v.* Woods, 12 Johns. (N. Y.) 190; McKinley *v.* Watkins, 13 Ill. 140; Maclay *v.* Harvey, 90 Ill. 525; Wagner *v.* Eggleston, 49 Mich. 218; Salmon *v.* Webster, 4 Col. 353.

§ 4. **Subject of Sale.** To constitute a sale, there must be something which is the subject of sale. A hope or expectation of means, founded on a right in being, may be the subject of sale, because in such case there is a potential existence. But a mere possibility or contingency, not founded upon a right or coupled with an interest, can not.[1] If at the time of sale the subject of sale has ceased to exist by any cause, there would be no sale, and if the price had been paid, it may be recovered.[2]

(1) Wheeler *v.* Wheeler, 2 Met. (Ky.) 474; Hutchinson *v.* Ford, 9 Bush (Ky.), 318; Jones *v.* Richardson, 10 Metc. (Mass.) 481; Rice *v.* Stone, 1 Allen (Mass.), 566; Henshaw *v.* Bank, 10 Gray (Mass.), 571; Low *v.* Pew, 108 Mass. 350; Thrall *v.* Hill, 110 Mass. 238; Allen *v.* Goodenow, 71 Me. 420; Pierce *v.* Emery, 32 N. H. 484.

(2) Benjamin on Sales, § 76.

§ 5. **Consideration.** Price is an element of every valid sale, and must be either determined or determinable. It need not be paid down, but there must be an agreement to pay. In the absence of a fixed price, the law would imply a promise to pay as much as the property was reasonably worth.[1]

If the parties agree that the price of the goods sold shall be fixed by the valuation of third parties designated by them, and the price is determined by them, this becomes a part of the contract, and both parties are bound by it.[2] If there be a delivery of goods in such a case, and the vendee shall prevent the valuation agreed upon—as by a destruction or consumption of the goods—or the valuers should disagree, the vendor could recover their value, to be determined by a jury.[3]

Where a quantity of *wheat* was sold and delivered, the price to be determined by the quotations, upon a day to be fixed by the vendee, and the wheat was destroyed before the day had been so fixed, but the vendee did afterward name the day, it was held that the sale was valid, and that the vendor was entitled to the payment of the price as fixed by the agreement.[4] So, where there was a sale of the *rigging of a vessel*, to be paid for ninety days after the first return trip, and the vessel was lost, it was held that the price of the rigging was due and enforceable, in ninety days after the time usually required for the trip.[5]

(1) James *v.* Muir, 33 Mich. 223; Callaghan *v.* Myers, 89 Ill. 566.

(2) Fuller *v.* Bean, 34 N. H. 301; Brown *v.* Bellows, 4 Pick. 189; Nut-

ting *v.* Dickinson, 8 Allen (Mass.), 540; Cunningham *v.* Ashbrook, 20 Mo. 553; McCandlish *v.* Newman, 22 Penn. St. 460; Mason *v.* Phelps, 48 Mich. 126; Newlan *v.* Dunham, 60 Ill. 233; Boss *v.* Veltum, 28 Minn. 512.

(3) Wittowsky *v.* Wasson, 71 N. C. 456; Clarke *v.* Westrope, 18 C. B. (Eng.) 765.

(4) McConnell *v.* Hughes, 29 Wis. 537.

(5) Randall *v.* Johnson, 59 Miss. 317.

§ 6. **Transfer of Property.** It has been held in some cases that delivery, as between the vendor and vendee, is not essential to pass title to the property.[1] However, it becomes essential if the delivery by the terms of sale becomes one of the conditions thereof—which subject is more fully discussed in Article 6.

(1) Hooban *v.* Bidwell, 16 Ohio, 509; 47 Am. Dec. 386; Griffin *v.* Chubb, 7 Tex. 603; 57 Am. Dec. 85.

CHAPTER II.

ELEMENTS REQUIRED BY STATUTE.

ARTICLE 2.—STATUTES OF FRAUDS.

§ 7. Statutory Provisions.
§ 8. Affects Remedy only.
§ 9. Application.
§ 10. Acceptance of Goods.
§ 11. Constructive Acceptance.
§ 12. Earnest and Part Payment.
§ 13. Form of Memorandum.
§ 14. Parties to Memorandum.
§ 15. Price Designated in Memorandum.
§ 16. Signing of Memorandum.

§ 7. **Statutory Provisions.** The English statute of frauds, which may be found substantially in the statutes of the various states of the American Union, and is applicable to the class of sales under consideration, provided that contracts not to be performed within a year from the making thereof, must be in writing; and that no contract for the sale of any goods, wares or merchandise, for the price of ten pounds sterling, or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said contract be made and signed by the parties to be charged by such contract, or their agents thereto lawfully authorized.

Thus, in all states, except in Pennsylvania and North Carolina, no action can be brought to charge any person upon any agreement that is not to be per-

formed within one year from the making thereof, unless the agreement, or some memorandum or note thereof is in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized. But in New York, Michigan, Wisconsin, Minnesota, Nebraska, California, Oregon, Nevada, Washington, Dakota, Idaho, Montana, Wyoming, Utah, Alabama, and Arizona, the contract to be within the statute must "by its terms" indicate that it is not to be performed within a year from the making thereof. And in Delaware and Alabama, in the sale of personal property, he who may be lawfully authorized to sign the contract or memorandum for the party to be charged, must be authorized in writing.

Clause 16 of the English statute is followed in Colorado, Connecticut, Dakota, Florida, Georgia, Idaho, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New York, South Carolina, Wisconsin, and Wyoming; and no contract for the sale of goods, wares, and merchandise for the price of fifty dollars or more is valid, except the buyer accept and receive part of the goods sold, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged therewith, or their agents thereunto lawfully authorized. While in Maine, New Jersey, Missouri, and Arkansas the limit is thirty dollars; in New Hampshire, thirty-three dollars; in Arizona, one hundred dollars; in California and Idaho, two hundred dollars; in Montana and Utah, three hundred dollars; in Vermont, forty dollars; and in Florida and Iowa there is no fixed limitation as to value.

In Georgia, it is specifically provided that the statute shall apply, whether the goods, the subject of sale, are in esse or not; but in Iowa, this section does not apply where the personal property, the subject of sale, is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money are necessary to be expended in producing or procuring the same. While in California and Dakota, an agreement to manufacture a thing from materials furnished by the manufacturer or by another person, is excepted from the provisions of the statute.

And it is also provided, in New York, Indiana, Michigan, Wisconsin, Minnesota, Nebraska, California, Oregon, Nevada, Colorado, Dakota, Idaho, Montana, Utah, and Arizona, that nothing contained in the statute of frauds should abridge the powers of a court to compel the specific performance of agreements partly performed.

§ 8. **Affects Remedy only.** The purpose of these statutes is to prevent fraud and falsehood, by requiring a party who seeks to enforce an oral contract, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on.

They do not declare that the contract shall be void or illegal unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered—the statutes affecting the remedy only.[1]

Mr. Browne, in his work on "Statutes of Frauds," says: "The operation, then, which the statute has

upon a contract covered by it, is that no enforcement of the contract can be had while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought chooses to insist upon this defense; the statute does not make the contract illegal or void; a contract which was legal and actionable before the statute, is legal since and notwithstanding the statute, and is also actionable or enforceable if the making of the contract be followed by compliance with the requirements of the statute. Compliance with the requirements of the statute does not constitute the contract; the statute presupposes an existing lawful contract, the enforcement of which is suspended till the statute is satisfied."[2] Where the contract has been in fact completely executed on both sides, the rights, duties, and obligations of the parties resulting from such performance, stand unaffected by the statute.[3]

(1) Townsend *v.* Hargraves, 118 Mass. 334; Stone *v.* Dennison, 13 Pick. 1; Basford *v.* Pearson, 9 Allen, 387; Nutting *v.* Dickinson, 8 Allen, 540.

(2) Browne, Statute of Frauds, § 115.

(3) Stone *v.* Dennison, 13 Pick. (Mass.) 1; Mushat *v.* Brivard, 4 Dev. (N. C.) 73; Ryan *v.* Tomlinson, 39 Cal. 639; Jellison *v.* Jordan, 68 Me. 373; Middlesex *v.* Osgood, 4 Gray (Mass.), 447; Wood *v.* Shultus, 4 Hun (N. Y.), 309; Day *v.* Railroad Co., 51 N. Y. 583; 89 N. Y. 616; Story *v.* Hamilton, 86 N. Y. 616; Towsley *v.* Moore, 30 Ohio St. 184.

§ 9. **Application.** We shall only have to do with that section of the statute covering contracts for the sale of goods, wares, and merchandise. So varied and conflicting have been the decisions as to just what sales the statute did apply, that we do not here attempt to harmonize them. For example, it has been held that sales of shares of stock, choses in action, and the like, are not within the statute.[1] While, on the other hand, contracts for the sale of bank-notes,[2]

promissory notes,[3] shares of stock in an incorporated company,[4] wheat,[5] cotton,[6] iron, as fast as manufactured,[7] and auction sales,[8] have each been held to be within the statute of frauds. Contracts for the sale of goods, wares, and merchandise, are not excluded from the operation of the statute of frauds merely because they are executory.[9] Nor does the mere fact that the articles sold are not to be delivered immediately, take the case out of the statute.[10] Or, as is more elaborately stated in the case of the Passaic Mfg. Co. *v.* Hoffman,[11] a contract for an article coming under the general denomination of "goods, wares, or merchandise," made with one who manufactures and sells that kind of commodity to all who traffic in it, the quantity and the price being agreed upon, is a contract within the meaning of the statute of frauds, whether the manufacturer and vendor has, when the order for the article is given, the requisite quantity on hand, or has to manufacture it afterward. But if what is clearly contemplated by the contract is the skill, labor, care, or knowledge of the one who fabricates the article, or if the article would not have been produced, if the order had not been given for it, or if, when produced, it is unfitted for sale as a general article of merchandise, being adapted only for use by the person ordering it, then the contract is one for work and labor, and is not within the statute of frauds.

It may be safely said, that the accepted ruling of our courts is to the effect that an agreement to manufacture certain articles and furnish materials is not a contract for the sale of goods, wares, or merchandise, and therefore not within the statute of frauds.[12] And the same rule is applied where either labor, skill, or money are, by the terms of the contract, to be ex-

pended in producing or procuring the subject of sale.[13] A contract to send to Europe and have goods made for another, has been held not to be within the statute, for it is a contract of agency and not of sale.[14]

Where a sale consists of a number of articles at the same time, neither of which is of the price limited by statute, but which in gross exceed that sum, the contract is deemed to be entire, and to fall within the provisions of the statute.[15] But where goods sold by parol are to be delivered within a year, although the price is not to be paid until after the lapse of that time from the date of the sale,[16] the statute would not apply if the delivery in fact took place within the year.[17]

(1) Benj. on Sales, § 111; Whitmore *v.* Gibbs, 24 N. H. 484; Vowter *v.* Griffin, 40 Ind. 593; Hudson *v.* Weir, 29 Ala. 294.

(2) Riggs *v.* Magrauder, 2 Cranch C. Ct. 143.

(3) Baldwin *v.* Williams, 3 Metc. (Mass.) 365.

(4) North *v.* Forest, 15 Conn. 400; Southern Ins. Co. *v.* Cole, 4 Fla. 359; Calvin *v.* Williams, 3 Har. & J. (Md.) 38; Tisdale *v.* Harris, 20 Pick. (Mass.) 9; Fine *v.* Hornsby, 2 Mo. App. 61.

(5) Hooker *v.* Knob, 26 Wis. 511; Nichols *v.* Mitchell, 30 Wis. 329.

(6) Bowers *v.* Anderson, 49 Ga. 143; Grover *v.* Warfield, 50 Ga. 644.

(7) Sawyer *v.* Ware, 36 Ala. 675.

(8) Sanderlin *v.* Trustees, R. M. Charlt. (Ga.) 551; Davis *v.* Rowell, 2 Pick. (Mass.) 64; Davis *v.* Robertson, 1 Treadw. (S. C.) Const. 71.

(9) Cason *v.* Chully, 6 Ga. 554; Edwards *v.* Grand Trunk R. R. Co., 48 Me. 379; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58.

(10) Jackson *v.* Covert, 5 Wend. (N. Y.) 139; Waterman *v.* Meigs, 4 Cush. (Mass.) 497.

(11) Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.), 495.

(12) Allen *v.* Jarvis, 20 Conn. 38; Hight *v.* Ripley, 19 Me. 137; Mixer *v.* Howarth, 21 Pick. (Mass.) 205; Spencer *v.* Cone, 1 Metc. (Mass.) 283; Phillips *v.* McFarlane, 3 Minn. 109; O'Neil *v.* Mining Co., 3 Nev. 141; Sewall *v.* Pitch, 8 Cow. (N. Y.) 215; Bronson *v.* Wiman, 10 Barb. (N. Y.) 406; Donovan *v.* Wilson, 26 Barb. 138; Parker *v.* Schenck, 28 Barb. 38; Mead *v.* Case, 33 Barb. 202; Roberts *v.* Vaughn, 3 Sandf. (N. Y.) 1; Parsons *v.* Loucks, 4 Robt. (N. Y.) 216; Pitkin *v.* Noyes, 48 N. H. 294.

(13) Bennett *v.* Nye, 4 Greene (Iowa), 410; Abbott *v.* Gilchrist, 38 Me. 260; Suber *v.* Pullin, 1 S. C. 273.

(14) Bird *v.* Muhlinbrink, 1 Rich. (S. C.) 199.
(15) Gilman *v.* Hill, 36 N. H. 311.
(16) Johnson *v.* Watson, 1 Ga. 348.
(17) Rakes *v.* Pope, 7 Ala. 161.

§ 10. **Acceptance of Goods under the Statutes of Fraud.** We have seen that, under certain circumstances, in a majority of the states, acceptance of the goods and chattels, the subject of sale, is essential. It therefore becomes important to consider what acts of the vendee amount to an acceptance within the meaning and requirements of the statute of frauds.

Lord Blackburn,[1] commenting on the English statute, says: "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur; the buyer must accept, and he must actually receive, part of the goods; and the contract will not be good unless he does both. And this must be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be unreasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not

whether he ought to accept, but whether he has accepted them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them."[2]

To satisfy the statute there must be a delivery of the goods by the vendor, with an intent of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking the possession as owner.[3] No act of the vendor alone, in however strict conformity to the terms of the contract, will satisfy the statute.[4] There must be some acts of the vendee; mere words constituting part of the original contract do not constitute an acceptance.[5] Neither is a mere delivery sufficient; there must further be an acceptance and receipt of the vendee, else he will not be bound.[6] It is well established that the acceptance and receipt need not be simultaneous with the verbal contract of sale; it is sufficient if they take place within a reasonable time afterward.[7] And the acceptance may be by sample, if the particular sample accepted is taken from and diminishes the bulk of the goods to be finally delivered; but otherwise, if the sample is considered only a specimen, and forms no part of the goods sold.[8]

(1) Blackburn on Sales, 22, 23.

(2) Maxwell *v.* Brown, 39 Me. 98; Rogers *v.* Phillips, 40 N. Y. 519; Prescott *v.* Locke, 51 N. H. 94; Gibbs *v.* Benjamin, 45 Vt. 124; Knight *v.* Mann, 118 Mass, 143; Culkins *v.* Hellman, 47 N. Y. 449.

(3) Phillips *v.* Bistolli, 2 B. & C. 511; Knight *v.* Mann, 118 Mass. 143; Remick *v.* Sanford, 120 Mass. 316; Hewes *v.* Jordan, 39 Md. 479; Stone *v.* Browning, 51 N. Y. 211; Gray *v.* Davis, 10 N. Y. 285; Marsh *v.* Rouse,

44 N. Y. 643; Shepherd *v.* Pressey, 32 N. H. 55; Young *v.* Blaisdell, 60 Me. 272; Bowers *v.* Anderson, 49 Ga. 143; Dooley *v.* Elbert, 47 Mich. 615; Dole *v.* Stimpson, 21 Pick. 384.

(4) Hawley *v.* Keeler, 53 N. Y. 114; Messer *v.* Woodman, 22 N. H. 172, 182.

(5) Shepherd *v.* Pressey, 32 N. H. 57; Bowers *v.* Anderson, 49 Ga. 145.

(6) Maxwell *v.* Brown, 39 Me. 101; Edwards *v.* Grand Trunk Ry. Co., 54 Me. 111; Denny *v.* Williams, 5 Allen, 3; Johnson *v.* Cuttle, 105 Mass. 449; Hewes *v.* Jordan, 39 Md. 473.

(7) Bush *v.* Holmes, 53 Me. 417; Marsh *v.* Hyde, 3 Gray, 331; Damon *v.* Osborn, 1 Pick. 480; Davis *v.* Moore, 13 Me. 424; Richardson *v.* Squires, 37 Vt. 640; Thompson *v.* Alger, 12 Met. 435; Chapin *v.* Patter, 1 Hilton (N. Y.), 366; Sale *v.* Darragh, 2 Hilton, 184; Van Wert *v.* Ry., 67 N. Y. 538; Sprague *v.* Blake, 20 Wend. 61; McCarthy *v.* Nash, 14 Minn. 127; Pinkham *v.* Mattox, 53 N. H. 604; Hewes *v.* Jordan, 39 Md. 473; Amson *v.* Dreher, 35 Wis. 615; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Buckingham *v.* Osborne, 44 Conn. 133.

(8) Davis *v.* Eastman, 1 Allen, 422; Bush *v.* Holmes, 53 Me. 418; Pratt *v.* Chase, 40 Me. 269; Atwood *v.* Lucas, 53 Me. 508; Danforth *v.* Walker, 40 Vt. 257.

§ 11. **Constructive Acceptance.** The acceptance of the goods, or a part of them, as required by the statute, may be constructive only, and the question whether the facts proven amount to a constructive acceptance is one of fact for the jury, not a matter of law for the court.[1] The acceptance must be clear and unequivocal,[2] but it is a question for the jury whether, under all the circumstances, the acts which the vendee does, or forbears to do, amount to an acceptance.[3] If, however, the facts are not in dispute, it belongs to the court to determine their legal effect.[4] And it is said that it "is for the court to withold the facts from the jury, when they are not such as can in law warrant finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence."[5] A constructive acceptance may be inferred when the

vendee deals with the goods as his own, and does that which he would be authorized to do if the owner, but not otherwise.[6] As the taking possession of a bill of lading,[7] marking, or permitting another to mark goods with the name of the vendee,[8] acceptance of an order given by the vendor upon his agent to deliver the property, and which order the agent recognizes and accepts, have been held to be constructive acceptance.[9] And it has been held that the acceptance of a part of the goods takes the case out of the statute, although a portion is still to be manufactured.[10] "But, in order to take the contract out of the operation of the statute of frauds, on the ground of acceptance of the goods, or a portion of them, there must be acts of such a character as to place the property unequivocally within the power of the vendee as the absolute owner, discharging all lien for the price."[11] Delivery of the goods to a designated common carrier would constitute a receipt by the vendee, but would not usually constitute an acceptance of the goods.[12] So also it has been held that the delivery of the goods to the vendee, and the unpacking of them by him, are not sufficient acceptance, if it appear that he has taken them into his possession and kept them for no greater time than was reasonably necessary to enable him to examine their quantity and quality, and to declare his approval or disapproval of them.[13] There is no acceptance, unless the vendee has exercised his option to receive the goods sold, or not, or has done something to deprive him of his option.[14]

(1) Eden *v.* Dudley, 1 Q. B. (Eng.) 302; Bushell *v.* Wheeler, 15 Q. B. 442; Pinkham *v.* Mattox, 53 N. H. 605; Simpson *v.* Krumdick, 28 Minn. 352; Frostburg Mining Co. *v.* New England Glass Co., 9 Cush. 118;

Borrowscale *v.* Bosworth, 99 Mass. 381; Sawyer *v.* Nichols, 40 Me. 212; Garfield *v.* Paris, 96 U. S. 557.

(2) Prescott *v.* Locke, 51 N. H. 94; Snow *v.* Warner, 10 Met. 136; Denny *v.* Williams, 5 Allen, 3; Dale *v.* Stimpson, 21 Pick. 384; Boynton *v.* Veazie, 24 Me. 286; Gibson *v.* Stevens, 8 How. (U. S.) 384.

(3) Tibbett *v.* Morton, 15 Q. B. 428; Rappleye *v.* Adie, 65 Barb. 589; Sawyer *v.* Nichols, 40 Me. 212; Bailey *v.* Ogden, 3 Johns. 399, 420; Wartman *v.* Breed, 117 Mass. 18.

(4) Shepherd *v.* Pressey, 32 N. H. 56.

(5) Browne, Stat. Frauds, § 321; Denny *v.* Williams, 5 Allen, 5; Howard *v.* Borden, 13 Allen, 299.

(6) Parker *v.* Wallis, 5 E. & B. 21; Chapin *v.* Rogers, 1 East, 195; Pinkham *v.* Mattox, 53 N. H. 604; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Dallard *v.* Potts, 6 Allen (N. B.), 443; Phillips *v.* Merritt, 2 U. S. C. P. 513; Tower *v.* Tudhope, 37 U. S. Q. B. 200.

(7) Currier *v.* Anderson, 3 E. & E. (Eng.) 592; Quintard *v.* Bacon, 99 Mass. 185.

(8) Bill *v.* Bament, 9 M. & W. (Eng.) 36; Baldey *v.* Parker, 2 B. & C, 37; Rappleye *v.* Adie, 65 Barb. 589; Dyer *v.* Libby, 61 Me. 45.

(9) Sahlman *v.* Mills, 3 Strob. (S. C.) 384; 51 Am. Dec. 630.

(10) Gault *v.* Brown, 48 N. H. 183; Marsh *v.* Hyde, 3 Gray (Mass.), 331; Ross *v.* Welsh, 11 Gray, 235; Steam Saw Mill and Lumber Co. *v.* Gittshall, 3 Col. 8.

(11) Marsh *v.* Rouse, 44 N. Y. 643.

(12) Benj. on Sales, 181; Dawes *v.* Peck, 8 T. R. (Eng.) 330; Dunlap *v.* Lambert, 6 Cl. & F. (Eng.) 600; Norman *v.* Phillips, 14 M. & W. 277; Smith *v.* Hudson, 6 B. & S. (Eng.) 431; Cross *v.* O'Donnell, 44 N. Y. 661; Caulkins *v.* Hellman, 47 N. Y. 449; Everetts *v.* Parks, 62 Barb. (N. Y.) 9; Magruder *v.* Gage, 33 Md. 344; Putman *v.* Tillottson, 13 Met. (Mass.) 517; Merchant *v.* Chapman, 4 Allen (Mass.), 362; Foster *v.* Rockwell, 104 Mass. 167; Strong *v.* Dods, 47 Vt. 348; Cobb *v.* Arundell, 26 Wis. 553.

(13) Hewess *v.* Jordan, 39 Md. 472; Stone *v.* Browning, 52 N. Y. 211; Heermace *v.* Taylor, 14 Hun, 149.

(14) Gilman *v.* Hill, 36 N. H. 311, 321; Shepherd *v.* Pressey, 32 N. H. 55; Belt *v.* Marriott, 9 Gill, 331; Gorham *v.* Fisher, 30 Vt. 428.

§ 12. **Earnest and Part Payment.** A verbal contract will be valid, and proof of it competent, if something in earnest or part payment of the price be given. This was recognized by the common law, and the statute has not changed the rule. The payment may be shown by parol evidence, but proof of tender is not sufficient. There must be an actual acceptance of the

money tendered, by the vendor.[1] It is not sufficient that money be deposited with a third person, to be paid to either party in case of a breach of contract by the other.[2] The payment must be money or its equivalent—in other words, something of value—though the amount be immaterial.[3]

With the exception of the State of New York,[4] the time of payment is not essential. It may be made at the time of the sale or afterward,[5] by the vendee, or his agent acting within the scope of his authority.[6]

(1) Edgerton *v.* Hoge, 41 Vt. 676; Hawley *v.* Keeler, 53 N. Y. 114; Hicks *v.* Cleveland, 48 N. Y. 84.

(2) Howe *v.* Hayward, 108 Miss. 54; 11 Am. Rep. 306; Noakes *v.* Morey, 30 Ind. 103.

(3) Browne on Statute of Frauds, § 341; Artcher *v.* Zeh, 5 Hill (N. Y.), 200.

(4) R. S. of N. Y., part 11 C. 7, title 11, § 3, Vol. 3, p. 2328.

(5) Thompson *v.* Alger, 12 Met. 435; Davis *v.* Moore, 13 Met. 424; Gault *v.* Brown, 47 N. H. 183, 189; Vincent *v.* Germond, 11 Johns. 283; Sprague *v.* Blake, 20 Wend. 61.

(6) Hawley *v.* Keeler, 53 N. Y. 114.

§ 13. **Memorandum—its Form.** If the price exceed the limit provided by statute, or—where no price is fixed—if the value be clearly proven to be worth that sum, the statute requires evidence that the agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged thereby, or his lawful agent, unless part payment or delivery with acceptance is shown. It therefore becomes essential to ascertain just what characteristics that memorandum must possess. *The form* of the memorandum is not limited by statute; it may consist of a telegram,[1] or letter,[2] a receipt for money,[3] a bill of parcels,[4] or a stated account, in which the vendee charged himself with goods received,[5] or the

return of a sheriff on execution,[6] or a vote of a corporation entered on their records, signed by their clerk,[7] or a written proposition, if supported by oral evidence of acceptance.[8]

Any number of papers may be taken together to make out the note or memorandum, and it matters not how informal they are if the statute is substantially complied with; but where several papers are resorted to, each must be subscribed by the party to be charged, or imported by reference or annexation into one that is, leaving nothing to be supplied by parol to complete the memorandum except evidence of the identity of the paper.[9] The memorandum must be complete, so far as that all elements of the contract or engagement on the part of the party sought to be charged, must be stated,[10] or legally presumable by what is stated.[11]

(1) Trevor *v.* Woods, 36 N. Y. 307.

(2) Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497; Ashcroft *v.* Butterworth, 136 Mass. 511; Otwell *v.* Miller, 6 Md. 10.

(3) Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Ellis *v.* Deadman, 4 Bibb (Ky.) 466; Williams *v.* Morris, 95 U. S. 444.

(4) Batturs *v.* Sellers, 5 Hart & J. (Md.) 117; Hawkins *v.* Chase, 19 Pick. (Mass.) 502.

(5) Barry *v.* Coombe, 1 Pet. (U. S.) 640; Bourland *v.* Peoria, 16 Ill. 538.

(6) Hanson *v.* Barnes, 3 Gill & J. (Md.) 359; Fenwick *v.* Floyd, 1 Harr. & G. (Md.) 172; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Elfe *v.* Gadsden, 2 Rich. (S. C.) Law, 373; Nichal *v.* Ridley, 5 Yerg. (Tenn.) 63.

(7) Tufts *v.* Plymouth Gold Mining Co., 14 Allen (Mass.), 407; Johnson *v.* Trinity Ch. Soc., 11 Allen, 123; Chase *v.* City of Lowell, 7 Gray (Mass.), 33; Rhoads *v.* Castner, 12 Allen (Mass.), 130; Grimes *v.* Hamilton Co., 37 Iowa, 290.

(8) Sanborn *v.* Flagler, 9 Allen (Mass.), 474; Himrod Furnace Co. *v.* Cleveland and Mahoning R. R. Co., 22 Ohio St. 451; Argus Co. *v.* Mayor of Albany, 55 N. Y. 495.

(9) Abbott's Trial Evidence, p. 293.

(10) Wright *v.* Weeks, 25 N. Y. 153.

(11) Warren *v.* Winne, 2 Lans. 209.

§ 14. **Parties.** It is necessary that the memorandum should show who are the parties to the contract, by some reference sufficient to identify them.[1] The identification, however, is sufficient if, in addition to the signature of the party to be charged, it appear with reasonable certainty who the other party to the contract is;[2] thus, a letter addressed to the vendor and signed by the vendee,[3] even though the letter be addressed to and received by the agent of the vendor.[4] The parties may even be designated by their initials,[5] "and although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name, parol evidence being admissible to apply the description."[6]

(1) Browne on Statute of Frauds, § 372; Benjamin on Sales, § 234.

(2) Grafton *v.* Cummings, 7 Rep. 545; Thornton *v.* Kelly, 11 R. I. 498; Gowen *v.* Klous, 101 Mass. 449.

(3) Jacob *v.* Kirk, 2 Moo. & R. 221; Allen *v.* Bennet, 3 Taunt. 169; Williams *v.* Jordan, 6 Ch. Div. 517.

(4) Bateman *v.* Phillips, 15 East, 272; Williams *v.* Bacon, 2 Gray (Mass.), 387; Thayer *v.* Luce, 22 Ohio St. 62; Walsh *v.* Barton, 24 Ohio St. 28.

(5) Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446.

(6) Benjamin on Sales, § 237.

§ 15. **Price.** "It is plainly deducible from the decisions, that so far as the price is concerned, the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement; and, therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the

statute; and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price."[1] The price must be stated in the memorandum in words or figures which clearly indicate, as applied to the subject, what that price is. If the figures or letters, or both, used in the memorandum, do in fact, and in the light of a prevailing usage, afford this information, the memorandum to that extent is sufficient.[2]

"It is obvious that the statute will be satisfied by a statement as to what the parties stipulated was the price to be paid, although they mentioned no specific sum; as, for instance, if the agreement is to pay a price to be settled by arbitration,[3] or to pay the same for which the property had been previously purchased.[4] It has been held that an order for goods, 'on moderate terms,' sufficiently expresses the amount to be paid,[5] that being the stipulation made by the parties."[6] If the memorandum be silent as to the time of payment, a cash sale will be presumed.[7] If credit is given, it is one of the essential terms of the contract, and must appear in the memorandum.[8] But it is not material that it should appear in the memorandum, whether the deferred payments are to be with interest.[9]

(1) Benjamin on Sales, § 249.

(2) Gowen *v.* Klous, 101 Mass. 449, 454; Browne on Statute of Frauds, § 380.

(3) Cooth *v.* Jackson, 6 Ves. 12; Brown *v.* Bellows, 49 Pick. (Mass.) 178.

(4) Atwood *v.* Cobb, 16 Pick. (Mass.) 227.

(5) Ashcroft *v.* Morrin, 4 Man. & G. 450.

(6) Browne on Statute of Frauds, § 378.

(7) Fessenden *v.* Mussey, 11 Cush. (Mass.) 127. See § 33 on Cash Payment.

(8) Norton *v.* Dean, 13 Metc. (Mass.) 385; Davis *v.* Shields, 26 Wend.

(N. Y.) 341, McFarson's Appeal, 11 Penn. St. 503; Sales *v.* Hickman, 20 Penn. St. 180; Buck *v.* Pickwell, 27 Vt. 157; Ellis *v.* Deadman, 4 Bibb (Ky.), 466; Parker *v.* Bodley, 4 Bibb (Ky.), 102; Elfe *v.* Gadsden, 2 Rich. (S. C.) Law, 373; Wright *v.* Weeks, 3 Bosw. (N. Y.) 372.

(9) Atwood *v.* Cobb, 16 Pick. (Mass.) 227; Neufville *v.* Stuart, 1 Hill. (S. C.) Eq. 159.

§ 16. **Signing.** Whatever be the form of memorandum, the statute requires that it be signed by the party to be charged, or his agent, and the contract is good or not at the election of the party who has not signed it,[1] if accepted by him. The signature required must be some mark or emblem intended to denote a signature, and although the memorandum be written out with the party's own hand, there must still be a signature.[2]

The signature may consist of the mark of the party,[3] or his initials.[4] And, in the absence of a statutory provision requiring an actual manual subscription, the signature may be in printing, or by stamp, if there be sufficient evidence of its adoption as such by the party to be charged,[5] or it may be written with lead pencil.[6]

The location of the signature is immaterial—it may be in the body of the paper, or at the beginning or end—provided it be done with the intention of obligating.[7] It may even be made by a third party, at the request and in the presence of the party to be charged.[8]

As provided by statute, the memorandum may be signed by the duly authorized agent of the party to be charged. The agent may be a general agent or one expressly appointed, and the signing by a stranger is sufficient, if afterward ratified.[9] A broker, or auctioneer, is regarded as the agent of both parties, and a memorandum made and signed by him at the time of sale is sufficient.[10]

(1) Reuss *v.* Picksley R. R., 1 Ex. (Eng.) 342; Barstow *v.* Gray, 3 Me. 409; Railroad *v.* Evans, 6 Gray (Mass.) 25; Dressel *v.* Jordan, 104 Mass. 412; Davis *v.* Shields, 26 Wend. (N. Y.) 340; Justice *v.* Terry, 52 N. Y. 323; Mason *v.* Dicker, 72 N. Y. 595; Higdon *v.* Thomas, 1 H. & G. (Md.) 139; McFarson's Appeal, 11 Penn. St. 503; Young *v.* Paul, 10 N. J. Eq. 402; Douglass *v.* Spears, 2 N. & McC. (S. C.) 207; Cook *v.* Anderson, 20 Ind. 15; Ivory *v.* Murphy, 36 Mo. 534; De Cordova *v.* Smith, 9 Tex. 129; Thayer *v.* Luce, 22 Ohio St. 62.

(2) Worrall *v.* Munn, 5 N. Y. 229; Farris *v.* Martin, 10 Humph. (Tenn.) 495.

(3) 2 Kent, 511; Bickley *v.* Kunan, 60 Ala. 293.

(4) Palmer *v.* Stevens, 1 Denio (N. Y.), 478; Sanborn *v.* Folger, 9 Allen (Mass.), 474; Barry *v.* Coombe, 1 Pet. (U. S.) 640.

(5) Saunderson *v.* Jackson, 3 Esp. 180; Schneider *v.* Norris, 2 Maule & S. 286; Commonwealth *v.* Ray, 3 Gray (Mass.), 447; Lerned *v.* Wannemacher, 9 Allen (Mass.), 417; Boardman *v.* Spooner, 13 Allen (Mass.), 353; Braley *v.* Kelly, 25 Minn. 160.

(6) Benjamin on Sales, § 259.

(7) Coddington *v.* Goddard, 16 Gray (Mass.), 444; McComb *v.* Wright, 4 Johns. Ch. (N. Y.) 663; Anderson *v.* Harold, 10 Ohio, 400.

(8) Kawkins *v.* Chance, 19 Pick. (Mass.) 502.

(9) Newton *v.* Bronson, 13 N. Y. 587; Snyder *v.* Neefus, 53 Barb. 63.

(10) Benjamin on Sales, § 268; Coddington *v.* Goddard, 16 Gray (Mass.), 442; Remick *v.* Sandford, 118 Mass. 106.

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CHAPTER III.

CONDITIONS PRECEDENT TO BE PERFORMED BY VENDOR.

ARTICLE 3.—CONDITIONS PRECEDENT

§ 17. Intent Governs.
§ 18. Conditions must be Performed.

§ 17. **Intent Governs.** That there may be some condition to be performed before the actual transfer of title, and that the condition must be complied with or waived, before title passes, is well-established law.[1] And the condition may be one to be performed either precedent or subsequent to delivery. Whether a delivery under an agreement for the sale of chattels is absolute or conditional depends on the intent of the parties; and, to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms at the delivery.[2] It is sufficient if the intent of the parties can be inferred from their acts or the circumstances of the sale.[3] The condition may be expressed or implied.[4]

(1) Benjamin on Sales, § 320.
(2) Smith *v.* Tilton, 10 Me. (1 Fairf.) 350.
(3) Hammett *v.* Lineman, 48 N. Y. 399; Day *v.* Bassett, 102 Mass. 445; Hughes *v.* Sheaff, 19 Iowa, 335.
(4) Callaghan *v.* Myers, 89 Ill. 566.

§ 18. **Conditions must be Performed.** Conditions precedent must be fully and strictly performed before the party on whom their fulfillment is incumbent can call on the other to comply with his promise.[1] Conditions precedent may be dependent for fulfillment either on the vendor or vendee, and may refer to the

articles which are the subject of contract or the consideration to be paid therefor.

(1) Hunt *v.* Livermore, 5 Pick. 395; Dana *v.* King, 2 Pick. 155; Seymour *v.* Bennett, 14 Mass. 266; Brown *v.* Foster, 113 Mass. 136; Mazone *v.* Caze, 18 La. Ann. 13; Shaw *v.* Turnpike Co., 2 Penn. 454; Albany Dutch Church *v.* Bradford, 8 Cowen, 457; Southerland *v.* Gilmour, 2 Allen (N. B.), 481; Farmer *v.* D'Everado, 3 U. C. Q. B. 154; Levy *v.* Burgess, 64 N. Y. 390; Downey *v.* O'Donnell, 86 Ill. 49; Murray *v.* Baker, 6 Hun, 264; Schenke *v.* Rowell, 7 Daly, 286; Jones *v.* United States, 96 U. S. 122; White *v.* Day, 56 Iowa, 248; Sullivan *v.* Byrne, 10 S. C. 122; Zaleski *v.* Clark, 44 Conn. 218; Gibson *v.* Cranage, 39 Mich. 49; Clark *v.* Rice, 46 Mich. 308; Robinson *v.* Ins. Co., 31 U. C. C. P. 562.

ARTICLE 4.—CONDITIONS TO BE PERFORMED BY VENDOR.

§ 19. Rules Governing.
§ 20. Avoidance of Conditions.

§ 19. Rules Governing Conditions to be Performed by Vendor. The rule formulated by Lord Blackburn is, that where by the agreement the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them—or, as it is sometimes worded, into a deliverable state—the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of title.[1] The vendee may, however, waive the condition; and if he refuse to accept the performance, or hinder, or prevent it, he will have waived performance, and his liability becomes fixed and absolute.[2]

(1) Blackburn on Sales, 151, 152; Bailey *v.* Smith, 43 N. H. 141; Strouss *v.* Ross, 25 Ind. 300; McClung *v.* Kelley, 21 Iowa, 508; Foster *v.* Ropes, 111 Mass. 10; Paton *v.* Currie, 19 U. C. Q. B. 288; Gilbert *v.* N. Y. C. R. R. Co., 4 Hun, 378.

(2) Pontifer *v.* Wilkinson, 1 C. B. 75; Holme *v.* Guppy, 3 M. & W. 387; Armitage *v.* Insole, 14 Q. B. 728; Cort *v.* Railroad Co., 17 Q. B. 127; Aitcheson *v.* Cook, U. C. Q. B. 490; Smith *v.* Lewis, 26 Conn. 110; Mill Dam Foundry *v.* Hovey, 21 Pick. 437; Borden *v.* Borden, 5 Mass. 67;

Shaw *v.* Hurd, 3 Bibb, 372; Grave *v.* Donaldson, 15 Penn. St. 128; Kugler *v.* Wiseman, 20 Ohio, 361; Falansbee *v.* Adams, 86 Ill. 13; Hayden *v.* Reynolds, 54 Iowa, 157; Steamship Co. *v.* United States, 13 Ct. Cl. (U. S.) 209; Peck *v.* United States, 14 Ct. Cl. (U. S.) 84; Taylor *v.* United States, 14 Ct. Cl. (U. S.) 453; Wolf *v.* Marsh, 54 Cal. 228; Lawrence *v.* Miller, 86 N. Y. 131; Haden *v.* Coleman, 73 N. Y. 567; Taylor *v.* Risley, 28 Hun, 141; Summer *v.* Adams, 36 N. H. 449.

§ 20. **Avoidance of Conditions.** If the conduct of either party should render him incapable of carrying out the contract, it would be a complete breach of contract on his part, and the other party need not tender performance of the condition precedent. Acts of God preventing performance have been held to relieve the vendor.[1] But it has also been held, that where a party engages unconditionally, by express contract, to do an act, performance is not excused by an inevitable accident, or by an unforseen contingency not within his contract.[2] A contract to sell and deliver an animate thing at a certain day will be at an end if the subject of contract die in the interval. But where it is within the power of the vendor to perform the essential elements of a contract, nothing can relieve him of his obligation, excepting acts of the vendee.[3] If, however, the goods perish without his fault, he is excused from delivery on the day named.[4]

(1) Knight *v.* Bean, 22 Me. 531; Dickey *v.* Linscott, 20 Me. 453. Contra, see School District *v.* Dauchy, 25 Conn. 530.

(2) Harmony *v.* Bingham, 11 N. Y. 106; Railroad Co. *v.* Bowns, 58 N. Y. 573; Kemp *v.* Ice Co., 69 N. Y. 45; Hay *v.* Holt, 91 Penn. St. 88; School District *v.* Dauchy, 25 Conn. 530.

(3) White *v.* Mann, 26 Me. 361–368; Mill Dam Foundry *v.* Hovey, 21 Pick. 441. (See per.) Ryan *v.* Dayton, 25 Conn. 194; Adams *v.* Nichols, 19 Pick. 275; Boyle *v.* Agawam Canal Co., 22 Pick. 381; Lord *v.* Wheeler, 1 Gray, 282; Phillips *v.* Stevens, 16 Mass. 238; Beebe *v.* Johnson, 19 Wend. 500; Kribs *v.* Jones, 44 Md. 396; Delaware R. R. Co. *v.* Bowns, 58 N. Y. 573; Kemp *v.* Ice Co., 69 N. Y. 45; Booth *v.* Rolling Mill Co., 60 N. Y. 487; Harmony *v.* Bingham, 2 Kernan, 106; Hay *v.* Holt, 91 Penn. St. 88.

(4) Dexter *v.* Norton, 47 N. Y. 62.

ARTICLE 5.—CONDITIONS NECESSARY TO PUT IN A DELIVERABLE STATE.

§ 21. Separation.
§ 22. Measurement.

§ 21. Separation. If the goods are sold by number, weight, or measure, the sale is prima facie not complete till their quantity is ascertained; and, if they are mixed with others, not until they are separated and designated.[1] Where a separation has been made by the vendor of a portion of the personal property sold, but something still remains to be done to the rest, the portion separated becomes the property of the vendee.[2] And it makes no difference in the operation of this rule as to whether the contract is an entirety or not.

If in the course of separation the property deteriorates through the fault of the vendor, the vendee is not bound to receive it.[3]

In case of a contract to manufacture goods and sell them to another, no property in the material passes to the vendee until the article has been finished and set apart for the vendee, with his assent and accepted by him, although a portion of the price agreed upon may have been paid in the meantime.[4] Where property has been separated, title will pass (if that was the intention of the parties in making the contract), even though the vendor is required to do something in addition thereto.[5]

(1) Fuller *v.* Bean, 34 N. H. 290, 300, 301; Hutchinson *v.* Grand Trunk Ry. Co., 59 N. H. 487; Cook *v.* Logan, 7 Iowa, 142; Browning *v.* Hamilton, 42 Ala. 484; Randolph & Co. *v.* Elliott, 34 N. J. L. 184; Commercial Bank *v.* Gillette, 90 Ind. 268.

(2) Thompson *v.* Conover, 32 N. J. L. 466.

(3) Keeler *v.* Vandervere, 5 Lans. (N. Y.) 313.

(4) Hatterline *v.* Rice, 62 Barb. (N. Y.) 593. Contra, Goddard *v.* Binney, 115 Mass. 450; Shaw *v.* Smith, 48 Conn. 306.

(5) Morrow *v.* Reed, 30 Wis. 81; Morrow *v.* Campbell, 30 Wis. 90.

§ 22. **Measurement.** The authorities are both numerous and uniform, which hold that where any thing is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted.[1] The employment of a person to do the measuring is not sufficient; there must be an actual measurement.[2] But in the port of New York, where it is the custom, upon a purchase of *grain* in store, for the purchaser to select a measurer, who is thereupon employed by the board of measurers to measure the grain, and the measurement and leaving the grain in the store-house is by the custom a delivery to the purchaser, it has been held that, where the measurer was so employed, it was a substantial compliance with the custom, and a a valid delivery of the grain.[3]

A contract to sell and deliver *cotton* is not performed where the weight and value have not been ascertained, and in such sales it has been held that the cotton must be weighed with the concurrence or acquiescence of the vendee.[4] But where, on a sale of cotton, there is no agreement that it shall be weighed, weighing is not necessary to constitute a good delivery.[5]

A sale of *lumber* to be taken and measured from a

large bulk, and to be an average lot as to thickness and quality, is not complete, even between the parties, until selected and measured.[6] Where the lumber sold has been piled by itself, preparatory to shipping, and the possession of the whole delivered, title passes without any subsequent measurement.[7] When sold subject to measurement by an inspector, the vendee may insist on having it actually inspected and measured, or something equivalent. A mere estimate is not sufficient.[8] Where, by agreement, the parties are to do the measuring, but meet and disagree, the title does not pass, even though the sale be of an entire lot of lumber.[9] On the other hand, it has been held, that the whole quantity being identified and sold, at a fixed price per foot, the process of ascertaining the amount was not necessary to pass title, as it might have been if less than the whole amount delivered was to be sold and delivered by measurement. In that case the measurement might be necessary to fix the identity of the property sold. But when all is sold, no such process is needed to pass title—the ascertaining of the price being a mere mathematical computation, involving no further action to bring the minds together.[10]

Again, under a contract for the sale of thirty thousand *barrel staves*, at a specified rate per thousand, to be delivered at a specified depot, the delivery of seven thousand at the depot was sufficient to pass title to the vendee in the staves so delivered, although he had not seen them, and no count had been made to ascertain the amount to be paid.[11]

(1) Lingham *v.* Eggleston, 27 Mich. 324; Lowry *v.* Barelli, 21 Ohio St. 324; Ortman *v.* Green, 26 Mich. 209; First Nat. Bank of Marquette *v.* Crowley, 24 Mich. 492; Hahn *v.* Fredericks, 30 Mich. 223; Wilkinson *v.* Holiday, 33 Mich. 386; Courtright *v.* Leonard, 11 Iowa, 32; Seris *v.*

Beliocg, 17 La. Ann. 146; Rhea *v.* Otto, 19 La. Ann. 123; Ockington *v.* Richey, 41 N. H. 275; Abat *v.* Atkinson, 21 La. Ann. 414; Frost *v.* Woodruff, 54 Ill. 155.

(2) Everett *v.* Clements, 9 Ark. 478.

(3) McCready *v.* Wright, 5 Duer (N. Y.), 571.

(4) Jones *v.* Pearce, 25 Ark. 545.

(5) Kauffman *v.* Stone, 25 Ark. 336.

(6) Ockington *v.* Richey, 41 N. H. 275.

(7) Tyler *v.* Strang, 21 Barb. (N. Y.) 198; Dexter *v.* Bevins, 42 Barb. (N. Y.) 573; Riddle *v.* Varnum, 20 Pick. 280.

(8) McAndrews *v.* Santee, 57 Barb. (N. Y.) 193.

(9) Gibbs *v.* Benjamin, 45 Vt. 124; Hutchins *v.* Gilchrist, 23 Vt. 88; Hale *v.* Huntley, 21 Vt. 147.

(10) Adams Mining Co. *v.* Senter, 26 Mich. 80; Bigole *v.* McKenzie, 26 Mich. 470; Whitcomb *v.* Whitney, 24 Mich. 486; Wilkinson *v.* Holliday, 33 Mich. 386; Bremer *v.* Mich. Salt Ass., 47 Mich. 526; Southwestern Freight Co. *v.* Standard, 44 Mo. 71.

(11) Hyde *v.* Lathrop, 2 Abb. (N. Y.) App. Decis. 436; Crofoot *v.* Bennett, 2 Comst. 258; Tyler *v.* Strang, 21 Barb. 198; Dexter *v.* Norton, 55 Barb. 272; Bradley *v.* Wheeler, 44 N. Y. 495; Comfort *v.* Kiersted, 26 Barb. 472.

ARTICLE 6.—DELIVERY.

§ 23. Delivery—Question of Intent.
§ 24. Symbolical, or Constructive Delivery.
§ 25. Delivery to Carrier.
§ 26. Delivery of More or Less than Contracted for.
§ 27. Time of Delivery.
§ 28. Place of Delivery.
§ 29. Estoppel—Delivery by.

§ 23. **Delivery—Question of Intent.** Whether delivery be absolute or conditional, is a question of intent to be ascertained from the conduct of the parties.[1] The intent is usually one for the jury to determine.[2] But the evidence may justify a determination of the question by the court, as one of law.[3] In the absence of stipulations to the contrary, the law implies that the place of delivery is at the place where the property is, at the time of sale, and that it is at the vendee's disposal at that place.[4] A different

rule, however, prevails where the time and place of delivery is provided by the terms of delivery, and the sale would not be complete until the property is delivered according to contract. The law can not make a new contract for the vendor and vendee; but, if the time of delivery be not fixed by contract, delivery must be made within a reasonable time, dependent upon the facts and circumstances of each case.[5]

(1) McComber *v.* Parker, 13 Pick. 182; Riddle *v.* Varnum, 20 Pick. 283; Bethel Steam Mill Co. *v.* Brown, 57 Me. 18; Fuller *v.* Bean, 34 N. H. 290; Prescott *v.* Locke, 51 N. H. 101; Russell *v.* Carrington, 42 N. Y. 118; Hammett *v.* Linneman, 48 N. Y. 399; Fitch *v.* Burk, 38 Vt. 689; Morse *v.* Sherman, 106 Mass. 433; Dugan *v.* Nichols, 125 Mass. 43; Cunningham *v.* Ashbrook, 20 Mo. 553; Wilkinson *v.* Holliday, 33 Mich. 386.

(2) George *v.* Stubb, 26 Me. 250; Kalsea *v.* Haines, 41 N. H. 253; Marble *v.* Moore, 102 Mass. 443; Dyer *v.* Libby, 61 Mo. 45; De Kidder *v.* McNight, 13 Johns. 294; Clung *v.* Kelly, 21 Iowa, 508; Byer *v.* Elnyer, 2 Gill (Md.), 150.

(3) Chapman *v.* Shepard, 39 Conn. 413; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Wighton *v.* Bowley, 130 Mass. 254.

(4) Benjamin on Sales, § 682; Miles *v.* Roberts, 34 N. H. 254; Middlesex Co. *v.* Osgood, 4 Gray, 447; Goodwin *v.* Holbrook, 4 Wend. 380; Rice *v.* Churchill, 2 Denio (N. Y.), 146; Kraft *v.* Hurtz, 11 Mo. 109; Atwood *v.* Cobb, 16 Pick. 227.

(5) Cocker *v.* Franklin Hemp Mfg. Co., 3 Sum. (U. S. C. C.) 530; Rankin *v.* Goddard, 4 Allen (N. B.), 155; Brunskill *v.* Mair, 15 U. C. Q. B. 213; Cox *v.* Jones, 24 U. C. Q. B. 81; Steel Works *v.* Dewey, 37 Ohio St. 242; Bolton *v.* Riddle, 35 Mich. 13; Coon *v.* Spaulding, 47 Mich. 162; Coates *v.* Sangston, 5 Md. 121; Randall *v.* Johnson, 59 Miss. 317.

§ 24. **Symbolical, or Constructive Delivery.** In the case of Chaplin *v.* Rogers,[1] Lord Ellenborough said: "Where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount—such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property." Our own courts

have held that the delivery required in each particular case depends upon the nature of the property and its situation; but if it be ponderous, a constructive delivery will be sufficient.[2]

So the delivery of a deed of transfer of a ship at sea, passes the title to her purchaser;[3] and her cargo may also be transferred by the delivery of a bill of lading,[4] or invoice.[5] The same is true of other like instruments which represent goods among merchants, as bills of lading or railroad receipts.[6]

But in every case the symbol employed must have been delivered with the intention of transferring the title to the property sold.[7]

(1) Chapin *v.* Rogers, 1 East, 192. See also, Elllis *v.* Hunt, 3 T. R. (Eng.) 464.

(2) Boynton *v.* Veazie, 24 Me. 286; Leisherness *v.* Berry, 38 Me. 83; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9; Shurtleff *v.* Willard, 19 Pick. 210; Jewett *v.* Warren, 12 Mass. 300; Terry *v.* Wheeler, 25 N. Y. 520; Hayden *v.* Demets, 53 N. Y. 426; Taylor *v.* Richardson, 4 Houston (Del.) 300; People's Bank *v.* Gridley, 91 Ill. 457; Andenried *v.* Randall, 3 Cliff. 99; Newcomb *v.* Cabell, 10 Bush, 460; Adams *v.* Foley, 4 Clarke (Iowa), 52; Puckett *v.* Reed, 31 Ark. 131.

(3) U. S. Rev. Stats., § 4192; Atkinson *v.* Mailing, 2 T. R. (Eng.) 462; Brinly *v.* Spring, 7 Me. 241; Baldwin *v.* Tucker, 1 Pick. 389; Gardner *v.* Howland, 2 Pick. 602; Joy *v.* Sears, 9 Pick. 4; Tucker *v.* Buffington, 15 Mass. 477; Turner *v.* Coolidge, 2 Me. 350.

(4) Peters *v.* Ballister, 3 Pick. 495; Pratt *v.* Parkman, 24 Pick. 42, 47; McKee *v.* Garcelon, 60 Me. 167; Gibson *v.* Stevens, 8 How. (U. S.) 399; Patrick *v.* Meserne, 18 N. H. 300; Bank of Peoria *v.* Railroad, 58 N. H. 203; Dixon *v.* Buck, 42 Barb. 70.

(5) Gardner *v.* Howland, 2 Pick. (2d ed.) 509.

(6) Salter *v.* Woollams, 2 M. & G. (Eng.) 650; Wood *v.* Manley, 11 Add. & E. 34; Warren *v.* Milliken, 57 Me. 97; Tuxworth *v.* Moore, 9 Pick. 347; Bank *v.* Crocker, 111 Mass. 163; Bank *v.* Dearborn, 115 Mass. 219; Newcomb *v.* Railroad, 115 Mass. 230; Trieber *v.* Andrews, 31 Ark. 163; Davis *v.* Russell, 58 Cal. 611; Newhall *v.* Langdon, 39 Ohio St. 87.

(7) Calcutt *v.* Ruttan, 13 U. C. Q. B. 146; Richardson *v.* Gray, 29 U. C. Q. B. 360; Puckett *v.* Reed, 31 Ark. 131; Adams *v.* Foley, 4 Iowa, 52; Bank *v.* Gridley, 91 Ill. 457; Terry *v.* Wheeler, 25 N. Y. 520; Hayden *v.* Dements, 53 N. Y. 426; Leisherness *v.* Berry, 38 Me. 83; Bethel Steam

Mill Co. *v.* Brown, 57 Me. 9; Cartwright *v.* Phoenix, 7 Cal. 281; Clark *v.* Draper, 19 N. H. 419.

§ 25. **Delivery to Carrier.** Where goods ordered and contracted for are not delivered directly to the vendee, but were to be sent to him by the vendor, and he deliver them to a carrier, properly consigned, and notify the vendee of that fact, the vendor has fulfilled his duty—the carrier so employed being regarded as the agent of the vendee.[1] The goods so delivered must be in a proper condition when delivered to the carrier, so that in case of damage, in transportation, an action may be maintained by the consignee against the carrier.[2] If it has been the usage between the parties, in former dealings, for the vendor to insure the goods before shipment, or consignment, or if he receive specific instructions to insure in any particular case, he is bound to insure.[3]

Delivery of the goods by the vendor to a designated carrier, in accordance with the specific request of the vendee, is a delivery to the vendee,[4] and any loss or damage in transportation must be borne by the vendee.[5] But if the vendee order goods delivered to a designated carrier, and the vendor ships by another route, the goods being lost, the loss must be borne by the vendor, not by the vendee.[6] For, by the act of shipment by another route than the one indicated by the vendee, the vendor continues to exercise dominion over the goods, and the delivery is therefore not complete.

(1) Magruder *v.* Gage, 33 Md. 344; Hall *v.* Gaylor, 37 Conn. 550; Merchants *v.* Chapman, 4 Allen, 362; Hunter *v.* Wright, 12 Allen, 548; Putnam *v.* Tillotson, 13 Metc. 517; Orcutt *v.* Nelson, 1 Gray, 536; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Higgins *v.* Murray, 73 N. Y. 252; Morey *v.* Medbury, 10 Hun, 540; Sohn *v.* Jervis, 1 North Eastern Rep. 73; Watkins *v.* Paine, 57 Ga. 50.

(2) Buckman *v.* Levi, 3 Camp. 414; Clarke *v.* Hutchins, 14 East. 475; Alexander *v.* Gardner, 1 Bing. (N. C.) 671; Dawes *v.* Peck, 8 T. R. 330.

(3) London Law Mag., Vol. 4, p. 359; Smith *v.* Lacelles, 2 T. R. 189.

(4) Glen *v.* Whitaker, 51 Barb. 451; Bradley *v.* Wheeler, 4 Rob. 18; Hills *v.* Lynch, 3 Rob. 42; Whiting *v.* Farrand, 1 Conn. 60; Quimby *v.* Carr, 7 Allen, 417; Finn *v.* Clark, 10 Allen, 484; Finn *v.* Clark, 12 Allen, 522; Downer *v.* Thompson, 2 Hill, 137; Foster *v.* Rockwell, 104 Mass. 170; Odell *v.* Boston & M. R. R., 109 Mass. 50; Wigton *v.* Bowley, 130 Mass. 252; Ober *v.* Smith, 78 N. C. 313; Burton *v.* Baird, 44 Ark. 556.

(5) Magruder *v.* Gage, 33 Md. 344.

(6) Wheelhouse *v.* Parr, (Mass.) 6 North-eastern Rep. 787.

§ 26. **Delivery of More or Less than Contracted for.** The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for,[1] or by sending goods sold mixed with other goods.[2] And where a purchaser received goods in excess of those ordered, and, on remitting the price of those ordered, wrote: "Balance of goods shipped me were not ordered. You will please have patience until they are sold, or they are subject to your order, if you prefer it"—it was decided that neither this communication nor the retention of the balance of the goods, for several years, without proof of sale, constituted in law any promise to pay for them.[3]

If the goods are delivered in an essentially altered condition,[4] the contract will, therefore, not have been complied with; but where the goods are ordered from a correspondent who is purchasing agent, the rule is less rigid;[5] for the law of principal and agent governs, and not that of vendor and vendee.[6]

As a general rule, it may be stated that the vendee may refuse to receive the goods tendered, if they either exceed the quantity agreed upon, or if they are of a less quantity.[7] But the vendee is bound to pay for any part that he accepts; and, after the time for

delivery has elapsed, he must either return or pay for the goods received, and can not insist on retaining them without payment until the vendor makes delivery of the rest.[8] This doctrine, however, has been expressly repudiated in New York.[9]

Words of qualification—such as "about," or "more or less"—show that the quantity is not restricted to the exact number or amount specified; and, in such cases, the vendor is to be allowed a certain moderate and reasonable latitude in the performance.[10]

(1) Benjamin on Sales, § 689; Croninger *v.* Crocker, 62 N. Y. 151; Highland Chemical and Mining Co. *v.* Mathews, 76 N. Y. 145; Hill *v.* Heller, 27 Hun (N. Y.), 416.

(2) Croninger *v.* Cracker, 62 N. Y. 151. See also, Southwell *v.* Breezley, 5 Oregon, 143.

(3) Goodwin *v.* Wells, 49 Ala. 309.

(4) Reynolds *v.* Shuter, 3 U. C. Q. B. 377.

(5) Ireland *v.* Livingston, L. R. 2 Q. B. 50.

(6) Cassaboglou *v.* Gibbs, 9 Q. B. D. 220.

(7) Dixon *v.* Fletcher, 3 M. & W. (Eng.) 146; Hart *v.* Mills, 15 M. & W. 85; Levy *v.* Green, 8 E. & B. (Eng.) 575; Oxendale *v* Whetherell, 9 B. & C. 386; Marland *v.* Stanwood, 101 Mass. 470; Rommel *v* Wingate, 103 Mass. 327; Croninger *v.* Crocker, 62 N. Y. 151; Wright *v.* Barns, 14 Conn. 518; Dula *v.* Cowles, 2 Jones L. (N. C.) 454, Smith *v.* Lewis, 40 Ind. 98; Railroad Co. *v.* Lent, 63 Ill. 288.

(8) Benjamin on Sales, § 600; Defenbaugh *v.* Weaver, 87 Ill. 132

(9) McMillan *v.* Venderlip, 12 Johns. 167; Champlin *v.* Rowley, 13 Wend. 260; Mead *v.* Digalyer, 16 Wend. 636; Kein *v.* Tupper, 52 N. Y. 555.

(10) Creighton *v.* Comstock, 27 Ohio St. 548, Brawley *v.* United States, 96 U. S. 168; Merriam *v.* United States, 14 Ct. of Claims, 289.

§ 27. **Time of Delivery.** Where the contract expresses the time of delivery, it has been held to be a question of construction; and, therefore, one for the court, rather than the jury, to consider.[1] In construing mercantile contracts, the word "month" is construed as a calendar month, unless the contrary meaning is clearly indicated by other expressions.[2] If delivery is to be made in a certain number of

days, they are to be construed as consecutive days, Sundays included; but the day of making the contract should be excluded in computing the time.[3] Delivery "between" two days includes the last day named or designated.[4] Readiness on the part of the vendee, at the time and place designated, has been held sufficient, without actual delivery.[5]

In the case of Startup *v.* MacDonald,[6] where the *hour*, up to which the vendor can make a valid delivery on the last day fixed by the contract, was under consideration, Parker, R., in his judgment, says: "Where a thing is to be done *anywhere*, a tender, a convenient time before midnight, is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight and a convenient time before sunset." And this may be regarded as the established rule in our own courts.[7]

In a late case of Stewart *v.* Marnell,[8] where the contract was to deliver ten car loads of blooms from an iron forge, "*as fast as they may be produced*," and the vendor had actually delivered all he produced, the court held that under the contract the blooms must be produced in the ordinary operations of the forge, with reasonable diligence, and with reasonable and proper efforts, and the vendor had no right to omit to produce them from mere motives of economy or convenience. And in the case of Phillips *v.* Taylor,[9] where the parties contracted, October 29, 1879, to ship four hundred and fifty bales of rags from Leghorn to New York by "*prompt shipment*," and the facts showed marked delay in delivery, the vendee refusing to accept delivery after March 5, 1880, it was held that the vendee, in an action by the vendor

for the price of the portion delivered could counterclaim damages occasioned by such delay.

Where one sells goods to another, to be shipped from a foreign port, the shipment to be made within *certain specified months*, and the goods to be of a certain quality, and the name of the vessel to be declared as soon as it is known to the vendor, the stipulations named are conditions precedent, to be performed by the vendor before he can sue for a breach of the contract; and if he fails to ship the goods of the quality prescribed within the time specified, or if he does not declare the name of the vessel as soon as it is known to him, the failure of these or any one of these conditions releases the vendee from liability.[10]

A delivery and acceptance after the agreed time does not itself enable the vendee to set up the non-delivery at the agreed time in reduction of the price.[11] But if a note is given in consideration for goods to be delivered at a future date, a failure to deliver at that time will constitute a failure of consideration.[12]

(1) Hill *v.* Hobart, 16 Me. 164; Atwood *v.* Clark, 2 Greenl. 249; Howe *v.* Huntington, 15 Me. 350; Kingsley *v.* Wallis, 14 Me. 57; Murray *v.* Smith, 1 Hawks, 41; Grune *v.* Dingley, 24 Me. 131; Cameron *v.* Dingley, 24 Me. 131; Cameron *v.* Wells, 30 Vt. 633; Welsh *v.* Gossler, 89 N. Y. 540; Atwood *v.* Clark, 2 Me. 249.

(2) Reg. *v.* Chawton, 1 Q. B. 247; Simpson *v.* Maritson, 11 Q. B. 23; Hart *v.* Middleton, 2 C. & K. 9; Webb *v.* Fairmaner, 3 M. & W. 473; Thomas *v.* Shoemaker, 6 Watts & S. (Penn.) 179; Barnes *v.* Boomer, 10 Grant (Ont.), 532; Churchill *v.* Merchants' Bank, 19 Pick. 532, 535.

(3) Brown *v.* Johnson, 3 M. & W. (Eng.) 331; Farwell *v.* Rogers, 4 Cush. (Mass.) 460; Butterick *v.* Holden, 8 Cush. 233; Homes *v.* Smith, 16 Me. 181; Oatman *v.* Walker, 33 Me. 71; Windsor *v.* China, 4 Greenl. 298; Ewing *v.* Bailey, 4 Scam. 420; Weeks *v.* Hull, 19 Conn. 376; Blake *v.* Crowningshield, 9 N. H. 304; Cornell *v.* Moulton, 3 Denio (N. Y.), 12.

(4) Atkins *v.* Boylston F. & M. Ins. Co., 5 Metc. 400; Richardson *v* Ford, 14 Ill. 332; Cook *v.* Gray, 6 Ind. 335; Cook *v.* Drais, 2 Cin.

(Ohio) 340; Mowry *v.* Kirk, 10 Ohio St. 375: Nixon *v.* Nixon, 21 Ohio St. 114.

(5) Cook *v.* Drais, 2 Cin. (Ohio) 340.

(6) Startup *v.* MacDonald, 6 M. & G. 593.

(7) Croninger *v.* Crocker, 62 N. Y. 151; McCarty *v.* Gokay, 31 Iowa, 505; Kirkpatrick *v.* Alexander, 60 Ind. 95.

(8) Stewart *v.* Marnell, (N. Y.) 4 N. E. Rep. 743.

(9) Phillips *v.* Taylor, (N. Y.) 4 N. E. Rep. 727.

(10) Salomon *v.* Boyken, (Md.) 7 Atlantic Rep. 701; Filley *v.* Pope, 6 Sup. Ct. Rep. 20; Norrington *v.* Wright, 6 Sup. Ct. Rep. 12; Cunningham *v.* Judson, (N. Y.) 2 N. E. Rep. 915.

(11) Moffatt *v.* Lunt, 2 Pugsley & Burbridge (N. B.), 673; Wharton *v.* Mo. Car Foundry Co., 1 Mo. App. 577; Bock *v.* Healy, 8 Daly (N. Y.), 156.

(12) Corwith *v.* Cotter, 82 Ill. 585.

§ 28. **Place of Delivery.** If the contract be to deliver the thing ordered at the residence or place of business of the vendee, the vendor is liable, although such delivery becomes impossible, unless it becomes so through the act of the vendee.[1] If the vendor refuse to deliver it at a time and place agreed on, and it perish afterward without his fault, he is liable for it. But if he be ready, and the vendee wrongfully refuse or neglect to receive it, the vendor is not liable, unless the thing perishes through his gross and wanton negligence.

If, in an action for goods sold and delivered, the vendor proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the vendee.[2]

If the vendee unreasonably neglect or refuse to comply with conditions precedent to delivery, or to receive the goods on delivery, the seller may, after due delay and proper precautions, resell them, and hold the buyer responsible for any deficit in the price.[3] It is common, and generally advisable, to sell them at auction, but it is not necessary.[4]

(1) Hayward *v.* Scougall, 2 Camp. 56; Atkinson *v.* Ritchie, 10 East, 530; De Medeiors *v.* Hill, 5 C. & P. 182.

(2) Nichols *v.* Morse, 100 Mass. 523; Pacific Iron Works *v.* Long Island R. R. Co., 62 N. Y. 272; Washburn Iron Co. *v.* Russell, 130 Mass. 543; Sedgwick *v.* Cottingham, 54 Iowa, 512; Wright *v.* Weed, 6 U. C. Q. B. 140; Supple *v.* Gilmour, 5 U. C. C. P. 318.

(3) McLean *v.* Duun, 4 Bing. 722; Mertens *v.* Adcock, 4 Esp. 251; Girard *v.* Taggart, 5 S. & R. 19; Sands *v.* Taylor, 5 Johns. 395.

(4) Crooks *v.* Moore, 1 Sandf. 279; Conway *v.* Bush, 4 Barb. 564.

§ 29. **Estoppel, Delivery by.** Lord Blackburn announces the doctrine that there are some cases in which it has been held that the property was changed, though acts necessary to put the goods in a deliverable state remained to be done by the vendor; but, upon investigation, it will be found that the conduct of the vendor estopped him from denying the transfer.[1] Thus, where a party negligently or culpably stands by and allows another to contract, on the faith and understanding of some fact which he can contradict, he can not dispute that fact in an action against the party whom he has thus assisted in deceiving.[2] Where a vendee is held out, or suffered to hold himself out as authorized to sell, the vendor is estopped from denying his authority,[3] and the authority of the vendee may even be inferred from the conduct of the vendor.[4] In a number of cases it has been held, that a bill of sale and order for the delivery of the goods, or a consignment to vendee and drafts drawn on account, or a receipt from the vendor as forwarding merchant, estopped the vendor from disputing title.[5]

(1) Blackburn on Sales, 190.

(2) Thompson *v*, Blanchard, 4 Comst. 303.

(3) Stephens *v.* Baird, 9 Cowen, 274; Pickering *v.* Busk, 15 East, 38.

(4) Dyer *v.* Pearson, 3 B. & C. 38.

(5) Davis *v.* Bradley, 24 Vt. 55; Brewster *v.* Baker, 16 Barb. 613; Whitaker *v.* Williams, 20 Conn. 98; Cox *v.* Buck, 3 Strobh. 367.

ARTICLE 7.—SALES BY DESCRIPTION.

§ 30. Delivery of Described Article, Essential.

§ 30. **Delivery of Described Article, Essential.** If the sale is of a described article, the tender of an article answering the description is a condition precedent to the vendee's liability, and if this condition be not performed, the vendee is entitled to reject the article,[1] or, if he has paid for it, to recover the price, as money had and received for his use;[2] whereas, in case of warranty, the rules are different.[3]

Lord Abinger, in Chanter *v.* Hopkins,[4] protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying:

"A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, collateral to the express object of it. But, in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as non-compliance with a contract which a party has engaged to fulfill; as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he shall sell him peas; the contract is to sell peas, and if he sells him any thing else in their stead, it is a non-performance of it."

Notwithstanding the apparent soundness of the reasoning of Lord Abinger, our American courts have

continued to hold that words of description in a sale constitute a warranty.[5] However, these cases may perhaps be reconciled to some extent, upon the ground, that in those cases where it was held that there was a warranty, there was something beyond mere matter of description—something amounting to an assertion or averment of a fact relating to the kind, quality, or condition of the article sold.

In the case of Winsor *v.* Lombard,[6] Shaw, C. J., said: "It is now held, that, without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is, in fact, an article of the species, kind, and quality thus expressed in the contract of sale." But it has also been held, that it is sufficient, if the goods are in specie, that for which they are sold and are merchantable under the denomination affixed to them by the vendor.[7]

If, upon delivery, the vendee, using due diligence, discover that the goods do not answer the description, he must forthwith offer to return them, and hold subject to vendor's orders. The offer to return must be unconditional, and not coupled with an offer to exchange them for something else—amounting to an exercise of ownership. Delay in offering to return, or any act equivalent to acceptance, employment, use, or disposition of the goods, after knowledge of deficiency, if any exists, would be construed either into an admission that there was no such deficiency, or into a waiver of his rights to rescind the sale because of such deficiency.[8]

(1) Mansfield *v.* Trigg, 113 Mass. 354.

(2) Smith *v.* Lewis, 40 Ind. 98; Doane *v.* Dunham, 65 Ill. 512; Cox *v.* Long, 69 N. C. 7.

(3) See § 51, on Sale by Description.

(4) Chandler *v.* Hopkins, 4 M. & W. 399.

(5) Hastings *v.* Lovering, 2 Pick. 214; Hogins *v.* Plympton, 11 Pick. 99; Winsor *v.* Lombard, 18 Pick. 60; Hernshaw *v.* Robins, 9 Metc. 87; Lamb *v.* Crafts, 12 Metc. 355; Bradford *v.* Manly, 13 Mass. 139; Morrill *v.* Wallace, 9 N. H. 114; Foss *v.* Sabin, 84 Ill. 564; Bryant *v.* Sears, 49 Iowa, 373; Osgood *v.* Lewis, 2 H. & Gill, 495; Borrekins *v.* Bevan, 3 Rawle, 23; Hawkins *v.* Pemberton, 51 N. Y. 204; Wolcott *v.* Mount, 7 Vroom, 262; Beals *v.* Olmstead, 24 Vt. 114; Richmond T. & M. Co. *v.* Farquat, 8 Blackf. 89.

(6) Winsor *v.* Lombard, 18 Pick. 60.

(7) Mixon *v.* Coburn, 11 Metc. 559; Lamb *v.* Crafts, 12 Metc. 353; Sweet *v.* Shumway, 102 Mass. 365; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 365; Fraley *v.* Bispham, 10 Penn. St. 320; Whitman *v.* Fruse, 23 Me. 212.

(8) Parsons on Contracts, Vol. 1, p. 593; Leslie *v.* Evans, 1 Clev. Rep. 273; Hirschborn *v.* Stewart, 49 Iowa, 418; Cahen *v.* Platt, 69 N. Y. 348; Graff *v.* Foster, 67 Mo. 512; Howard *v.* Hayes, 47 N. Y. Sup. Ct. 89; Gammon *v.* Abrams, 53 Wis. 323; Welch *v.* Gossler, 47 N. Y. Sup. Ct. 104; Helden *v.* Roberts, 134 Mass. 38; Dennis *v.* Stoughton, 55 Vt. 371; Mackey *v.* Swartz, 60 Iowa, 710; Philleo *v.* Sandwich Mfg. Co., 15 Neb. 625; Proctor *v.* Spratley, 78 Va. 254.

CHAPTER IV.

CONDITIONS PRECEDENT TO BE PERFORMED BY VENDEE.

ARTICLE 8.—IMPLIED CONDITIONS.

§ 31. Acceptance Not.
§ 32. Payment.
§ 33. Cash Payment.
§ 34. Payment by Check.
§ 35. Payment by Note.
§ 36. Tender.
§ 37. To whom Payment can be Made.

§ 31. Acceptance—Not an Implied Condition. The English statute of frauds provided that no contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold. Many features of this statute have been incorporated into the statutes of the various states of the Union. But unless the formal acceptance of the goods is provided for by the statutes of the state in which the contract is made, or is one of the express conditions of the contract, it will not be regarded as a condition precedent. Conditional sales partake of the nature of executory contracts of sale; for, whether the conditions be express or implied, they nevertheless provide for the doing of something in the future which is essential to make the sale complete. However, an executory contract of sale may become a complete bargain and sale, by the performance of the conditions necessary to vest title, and a right of action thereby vests in the vendor for the price or value of the goods, unless it be shown that such was not the intention of the parties.[1]

(1) Benjamin on Sales, § 314; Townsend *v.* Hargraves, 118 Mass. 325, Haskins *v.* Warren, 115 Mass. 533; Jenkins *v.* Jarrett, 70 N. C. 255; Lester *v.* East, 49 Ind. 588; Hanaur *v.* Bartels, 2 Col. 514.

§ 32. **Payment a Condition Precedent.** In every sale, unless otherwise expressed, there is an implied condition that the price shall be paid, before the vendee has a right to possession; and this is a condition precedent.[1] The delivery of the goods and payment of the price are presumed to be simultaneous and concurrent acts.[2] The delivery of the goods on such a sale, with the expectation of receiving immediate payment, is not an absolute delivery, and no title vests in the vendee until the price is paid.[3]

The common-law rule is, that the vendee has no right to delay payment until demand is made, but must pay as soon as the money is due.[4] However, where the price is made payable only after demand, a reasonable time must be allowed in which to make payment, and where payment is demanded after banking hours, and payment by check refused, it is not unreasonable delay for the vendee to offer payment in money on the morning of the next banking day.[5]

Where payment is made in the mode requested by the vendor, by mail, postal note, post-office money order, draft, or check, the vendee will be discharged from further liability, even though the money never reach the vendor's hands.[6] If money be transmitted in a letter, through the post-office, by a vendee to his vendor, without his previous direction or assent, either expressly given, or to be implied from his conduct, usual course of business, or particular facts and circumstances found, it remains, until it reaches its destination and is actually received, entirely at the risk of the vendee.[7]

(1) 2 Parsons on Contracts, § 537; Turner *v.* Moore, 58 Vt. 455.

(2) Benjamin on Sales, § 592; Elevator Co. *v.* Bank, 23 Ohio St. 311.

(3) Adams *v.* O'Connor, 100 Mass. 515; Whitwell *v.* Vincent, 4 Pick. 449; Liven *v.* Smith, Denio, 571; Conway *v.* Bush, 4 Barb. 564; Merrill *v.* Stanwood, 52 Me. 65; Keeler *v.* Field, 1 Paige, 312; Russell *v.* Minor, 22 Wend. 659; Hanson *v.* Meyer, 6 East, 614; Hays *v.* Currie, 3 Sandf. Ch. 585; Conger *v.* Railroad Co., 17 Wis. 477; Powell *v.* Bradlee, 9 Gill & Johns. 220; Haggerty *v.* Palmer, 6 Johns. Ch. 437; Acker *v.* Campbell, 23 Wend. 372; Coggill *v.* Railroad Co., 3 Gray, 545; Coil *v.* Willis, 13 Ohio St. 28; Chambers *v.* Frazier, 29 Ohio St. 362; Hodgson *v.* Barrett, 33 Ohio St. 63.

(4) Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa, 538; Brandon Mfg. Co. *v.* Morse, 48 Vt. 322.

(5) Bass *v.* White, 65 N. Y. 565.

(6) Warwick *v.* Noakes, Peake, 68, 98; Wakefield *v.* Lighgow, 3 Mass. 249.

(7) Crane *v.* Pratt, 12 Gray, 348, 349; Gurney *v.* Howe, 9 Gray, 404. 408

§ 33. **Cash Payment.** This condition may be expressed or implied, and it has been held that where goods are sold at a fixed price, to be paid on a certain day, and delivery is made upon condition express or implied, that until the price is paid the title is to remain in the vendor, payment is a condition precedent, and until performed the property is not vested in the vendee.[1] Therefore, if goods are delivered to the vendee, accompanied or followed[2] by an invoice or statement on which the words "cash," "net cash," or "cash in ten days," or any other words which mercantile usage may adopt to express this condition, no title vests until the condition shall have been complied with.[3] But, although a sale of goods be made for cash, yet if their delivery is unconditional, and without fraud or mistake, the title to the goods thereby becomes vested in the vendee, notwithstanding the cash is not in fact paid.[4] However, the use of the initials "C. O. D." manifests the vendor's intention to control the *jus disponendi*.[5]

The time allowed the vendee in which to pay the

cash may be varied by custom. In some localities "cash" is understood to mean payment in ten days (or a reasonable time in which to receive and examine the goods), while in others it is contended that payment in twenty or thirty days is a cash payment. But if the vendee makes an assignment prior to payment, he then puts it beyond his power to comply with the terms of sale, and no title vests,[6] for the assignee can take no better title than the vendee had.[7] Therefore, if the vendor is guilty of no laches he may recover the goods, even from one who has purchased from his vendee in good faith without notice.[8] However, in some states this rule has been so far modified, that if the conduct of the vendor be such as to allow the vendee to assume the position of owner, innocent purchasers from such conditional vendee acquire a good title.[9] But the same courts have held, that if the contract partakes of the nature of bailment, with an executory conditional agreement for the purchase of the chattel, the condition not having been performed, no title can be acquired from the bailee by a purchaser.[10]

(1) Blanchard *v.* Child, 7 Gray, 155; Burbank *v.* Crooker, 7 Gray, 158; Fifield *v.* Elmer, 25 Mich. 48; Dishon *v.* Bigelow, 8 Gray, 159; Whitney *v.* Eaton, 15 Gray, 225; Porter *v.* Pettingill, 12 N. H. 299; Lucy *v.* Bundy, 9 N. H. 298; Davis *v.* Emery, 11 N. H. 230; Gambling *v.* Read, 1 Meigs, 281–286; Heath *v.* Randall, 4 Cush. 195; Bennett *v.* Simms, 1 Rice, 421; West *v.* Bolton, 4 Vt. 558; Bigelow *v.* Huntley, 8 Vt. 151; Smith *v.* Foster, 18 Vt. 182; Buchmaster *v.* Smith, 22 Vt. 203; Root *v.* Lord, 23 Vt. 568; Armington *v.* Houston, 38 Vt. 448; Duncan *v.* Stone, 45 Vt. 118; Davis *v.* Bradley, 24 Vt. 55; Tibbetts *v.* Towle, 3 Fairf. 341; George *v.* Stubbs, 26 Me. 243; Sawyer *v.* Fisher, 32 Me. 28; Hotchkiss *v.* Hunt, 49 Me. 219; Brown *v.* Haynes, 52 Me. 578; Bunker *v.* McKinney, 63 Me. 529; Everett *v.* Hail, 67 Me. 497; Parris *v.* Roberts, 12 Ired. 268; Copeland *v.* Bosquet, 4 Wash. C. C. 588; Sewall *v.* Henry, 9 Ala. 24; Dudley *v.* Abner, 52 Ala. 572; Sumner *v.* Woods, 67 Ala. 139; Fairbanks *v.* Eureka Co., 67 Ala. 109: Rawls *v.* Saulsbury, 66 Ga. 396; Lam-

bert *v.* McCloud, 15 Rep. 780; Herring *v.* Happock, 15 N. Y. 409; Hasbrouck *v.* Loundsbury, 26 N. Y. 598; Bean *v.* Edge, 84 N. Y. 518; Herschorn *v.* Canney, 98 Mass. 150; Booraem *v.* Crane, 103 Mass. 522; Sage *v.* Sleuts, 23 Ohio St. 1; Little *v.* Page, 44 Mo. 412; Refining Co. *v.* Miller, 7 Phila. (Penn.) 97.

(2) Shenk *v.* Saunders, 15 Gray, 37; Marston *v.* Baldwin, 17 Mass. 606; Hammett *v.* Lineman, 48 N. Y. 399.

(3) Bauendahl *v.* Horr, 7 Blatchf. 548.

(4) Foley *v.* Mason, 6 Md. 37; Henderson *v.* Lauck, 21 Penn. St. 359; Pierson *v.* Hoag, 47 Barb. (N. Y.) 243.

(5) Wagner *v.* Hallack, 3 Cal. 176.

(6) Kraft *v.* Dulles, 2 Cin. Sp. Ct. Rep. 116.

(7) Hodgson *v.* Barrett, 33 Ohio St. 63.

(8) Ballard *v.* Burgett, 40 N. Y. 321; Sanders *v.* Keber and Miller, 28 Ohio St. 630.

(9) Smith *v.* Lynes, 5 N. Y. 41; Comer *v.* Cunningham, 77 N. Y. 391; Wait *v.* Green, 36 N. Y. 556; Dows *v.* Kidder, 84 N. Y. 121, 127; Fluman *v.* McKean, 25 Barb. 474; Hintermister *v.* Lane, 27 Hun, 497.

(10) Ballard *v.* Burgett, 40 N. Y. 321; Austin *v.* Dye, 46 N. Y. 500; Comer *v.* Cunningham, 77 N. Y. 398; Sargent *v.* Gile, 8 N. H. 325; McFarland *v.* Farmer, 42 N. H. 386; King *v.* Bates, 57 N. H. 446.

§ 34. **Payment by Check or Draft.** Where payment is made by a check, drawn by the vendee on his banker, this is a mode of making a cash payment, and not the acceptance of a security. Such payment is conditional, and if the check, upon due presentation, is dishonored, the vendor's right to retake the goods from the vendee remains in full force.[1] But if a check received in payment is not presented within reasonable time, and the drawer is injured by the delay, the check will operate as an absolute payment.[2] If payment is made by a check indorsed by the vendee, which the vendor might have refused, but instead of doing so, keeps the check, presents it to the bank for payment, and sues upon it, he must be deemed to have accepted the check in satisfaction of the goods sold, and the vendee's liability is only on his indorsement.[3]

A draft on a third person, received by the vendor from the vendee, is also presumed to be a conditional

payment, and the burden is upon the vendee to prove an agreement that it was to be an absolute payment.[4] In the case of Case *v.* Seass,[5] goods were sold to a firm, and drafts for acceptance sent. Meanwhile, the firm dissolved, and the succeeding member offered his own draft in settlement, which the vendor refused. Whereupon, the succeeding member again sent his own acceptances, with the false statement that the retiring member was east, but if the drafts were unsatisfactory, he would obtain an indorser. The vendor replied, that he was in need of the paper at once, and retained it. The retiring member knew of this correspondence, and retained control of the goods until it was closed. Held, that as the paper of the only debtor supposed to be within reach was forced upon the vendor, and no offer was made to return the merchandise, there was no implication, from the correspondence, of a discharge of the other debtor, and that if there was, it was made nugatory by the fraud of the purchasers.

Where payment is by exchange, the vendee, in purchasing a bill of exchange for remittance, is held only to the degree of care which a prudent business man exercises in conducting his own business, and he is not rendered liable by the unexpected failure of the bank drawing the bill before it can be presented.[6]

(1) Benjamin on Sales, § 731; Everett *v.* Collins, 2 Camp. 515; Smith *v.* Ferrand, 7 B. & C. 19; Pierce *v.* Davis, 1 Moody & Rob. 365; Hough *v.* May, 4 Ad. & E. 954; Small *v.* Franklin Mining Co., 99 Mass. 277; Weddigen *v.* Boston Elastic Fabric Co., 100 Mass. 422; Phillips *v.* Ballard, 58 Ga. 256; Sweet *v.* Titus, 67 Barb. 327; Hodgson *v.* Barrett, 33 Ohio St. 63; Fleig *v.* Sleet, 43 Ohio St. 53; Blair *v.* Wilson, 28 Gratt. 165; Kermeyer *v.* Newby, 14 Kan. 164; Woodburn *v.* Woodburn, 115 Ill. 427.

(2) Hopkins *v.* Ware, L. R. 4 Ex. 268; Smith *v.* Miller 43 N. Y. 171.

(3) Sellers *v.* Johnson, 65 N. C. 104; Redpath *v.* Kolfage, 16 C. Q. B. 433.

(4) League *v.* Waring, 85 Penn. St. 244; Hall *v.* Stevens, 40 Hun (N. Y.), 578.

(5) Case *v.* Seass, 44 Mich. 195.

(6) Underwriters' Wrecking Co. *v.* Underwriters, 40 Ark. 161.

§ 35. **Payment by Note.** Where it is part of a contract for sale of goods, that they are to be paid for by the negotiable note of the vendee, such payment is a condition precedent to the sale, and the title to the goods will not vest in the vendee by a delivery to him of the goods, without such payment, or waiver of the condition by the vendor.[1] However, the giving and acceptance of a note for the amount of a debt does not extinguish the indebtedness, unless an intent to extinguish is shown. Such intent may be either expressed, or implied from the circumstances; and is a question for the jury.[2]

If the note of the vendee is to be "satisfactorily indorsed" by a third person, the taking of the note by the vendor without indorsement, on the promise of the purchaser that the indorsement should be furnished, and making no subsequent demand for such indorsement, and failure to return the note, do not, as matter of law, amount to a waiver of the condition.[3]

If a bill or note be indorsed, and given by the vendee to the vendor merely as collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment, and if he neglect to present, or to give notice of dishonor to the vendee, the vendee will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount.[4]

Where, however, payment is made in paper to which the vendee is not a party, it is deemed to have

passed as cash.[5] If the securities thus passed were forged, or not what on their face they purport to be, the vendor would have the right to rescind the sale for failure of consideration. And if the securities, though genuine, were known to the vendee to be worthless when he passed them, his conduct would be deemed fraudulent, and the vendor would be entitled to rescind the sale, and bring an action in replevin for the goods.[6] The vendor must offer to return the note unless he proves it absolutely worthless.[7]

But if the worthless character of the securities is unknown to both parties, it would be a case of mutual mistake of fact, and the liability of the vendee would continue.[8]

Where the vendee, acting as the agent of an undisclosed principal, buys goods, and tenders his own note in settlement, the presumption that the note was taken in payment is rebutted, and the vendor may resort to the principal for payment.[9] And where a firm agreed to settle for merchandise with a note, and after dissolution a partnership note is given by the remaining partner, the other can repudiate his liability thereon; and if he is released, the vendor can treat the note as different from that agreed on, and it can not then be regarded as payment.[10]

Where by mistake a note for a less amount than due is executed, the title does not pass.[11]

But if delivery be made without a demand of the notes, within a reasonable time, the title will pass.[12]

(1) Young *v.* Kansas Mfg. Co., (Fla.) 2 So. Rep. 817; Whitney *v.* Eaton, 15 Gray (Mass.), 225; Osborn *v.* Gantz, 38 N. Y. Sup. Ct. 148; Budlong *v.* Cottrell, 64 Iowa, 234; Seed *v.* Lord, 66 Me. 580.

(2) Archibald *v.* Argoll, 53 Ill. 307; Willis *v.* Robinson, 80 Mo. 47, Heath *v.* White, 3 Utah, 474; McGuire *v.* Bidwell, 64 Tex. 43; Ex parte Williams, 17 S. C. 396.

(3) Kinney *v.* Ingalls, 126 Mass. 488.

(4) Benjamin on Sales, § 737.

(5) Camidge *v.* Allenby, 6 R. & C. 373.

(6) See Article on Fraud of Vendee, 18 Central Law Journal, 405; Pomeroy's Equity Jurisprudence, §§ 901–905.

(7) Estabrook *v.* Sweet, 16 Mass. 303.

(8) Roberts *v.* Fisher, 43 N. Y. 159.

(9) Lovell *v.* Williams, 125 Mass. 439.

(10) Goodspeed *v.* South Bend Plow Co., 45 Mich. 237.

(11) Littirel *v.* St. John, 4 Blackf. (Ind.) 326.

(12) Lupin *v.* Marie, 6 Wend. (N. Y.) 77; Hannequin *v.* Sands, 25 N. Y. 640; Smith *v.* Lynes, 5 N. Y. (1 Seld.) 41.

§ 36. **Tender.** A proper tender is an equivalent of payment, and is as much of a discharge of the vendee's duty as an actual payment. A proper tender requires the production and offer to the vendor of an amount of money equal to the price of the goods sold. But the actual production of the money may be dispensed with by the vendor.[1]

The mere offer to pay, it not appearing that the vendee had the money ready, does not amount to a tender.[2] However, the production of the money, and the actual offer of it, may be dispensed with, if the vendee is ready and willing to pay it, and is about to produce it, but is prevented from so doing by a declaration on the part of the vendor that he will not or can not receive it.[3] So, if a tender is prevented by any contrivance or evasion of the party to whom the money is to be paid, it will be equivalent to a tender, or a sufficient excuse for not making it.[4] He who makes a tender is not bound to count out the money; it is enough if the money be there and offered, so that the vendor, if he choose, may count it;[5] but the sum so produced must be the correct amount due.[6] A tender of a larger sum than is due, with a demand

for change, is not a good tender,[7] and it is well settled in England, that there can be no valid tender of a part of an entire sum due, though a vendee may make a valid tender on one of several distinct purchases, if he specify the account or purchase on which he makes the tender. He may also make a tender of a gross amount of several demands, if enough be tendered to pay them all.[8]

Tender of balance due after deducting a set-off will not be allowed; but, upon payment of the entire sum due into court, the vendee may set up the plea of set-off upon the suit of the vendor.[9]

And a plea of tender is not supported by proving an offer of a promissory note due from the vendor to the vendee.[10] The rule seems to be well established by numerous authorities, that a tender must be an unconditional offer of the money, and if accompanied by any qualifying words, or with a demand of any thing to be done by the party to whom the tender is made, beyond the receipt of the money tendered, it will avoid the tender.[11]

The vendee has no right to insist that the vendor shall admit that no more is due in respect of the demand for which the tender is made, and if tender be made of a sum of money in full for all legal claims, the vendor may receive the money, protesting that it is not sufficient, and if he pass it to the vendee's credit on account, without the vendee expressing any dissent, the acceptance of the tender will be no bar to the vendor's right to recover such sum as may be found due him, exceeding the amount of the tender.[12]

(1) Sargent *v.* Graham, 5 N. H. 440.

(2) Fuller *v.* Little, 7 N. H. 535; Breed *v.* Hurd, 6 Pick. 356; Wheeler *v.* Knaggs, 8 Ohio, 169; Bakeman *v.* Pooler, 15 Wend. 637; Brown *v.* Gilmore, 8 Greenl. 107; Cashman *v.* Martin, 50 How. Pr. 337.

(3) 2 Greenl. Ev. § 603; Barker *v.* Parkenhorn, 2 Wash. C. C. 142; Blight *v.* Ashley, Peters C. C. 15; Parker *v.* Perkins, 8 Cush. 318.

(4) Southworth *v.* Smith, 7 Cush. 391, 393; Borden *v.* Borden, 5 Mass. 67, 74; Gilmore *v.* Holt, 4 Pick. 258, 264; Tasker *v.* Bartlett, 5 Cush. 359; Hazard *v* Loring, 10 Cush. 267; Sands *v.* Lyon, 18 Vt. 18; Thorne *v.* Mosher, 5 C. E. Green, 257.

(5) Wheeler *v.* Knaggs, 8 Ohio, 169; Behaly *v.* Hatch, Walker (Miss.) 369; Breed *v.* Hurd, 6 Pick. 356.

(6) Isherwood *v.* Whitmore, 11 M. & W. 347.

(7) Benjamin on Sales, § 718.

(8) Thetford *v.* Hubbard, 22 Vt. 440.

(9) Benjamin on Sales, § 720.

(10) Cary *v.* Bancroft, 14 Pick. 315; Bellows *v.* Smith, 9 N. H. 285.

(11) Richardson *v.* Boston Chemical Laboratory, 9 Metc. 45, 52; Thayer *v.* Brackett, 12 Mass. 450; Loring *v.* Cooke, 3 Pick. 48; Robinson *v.* Batchelder, 4 N. H. 40; Buffum *v.* Buffum, 11 N. H. 451; Brown *v.* Gilmore, 8 Greenl. 110; Hepburn *v.* Auld, 1 Cranch, 321; Bacon *v.* Conn, 1 Sm. & M. Ch. 348; Eastland *v.* Longshorne, 1 Nott. & McC. 194; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; Wood *v.* Hitchcock, 20 Wend. 47; Hulos *v.* Slevin, 53 How. Pr. 356.

(12) Gassett *v.* Andover, 21 Vt. 342.

§ 37. **To whom Payment can be Made.** Payment can be properly made either to the vendor or his duly authorized agent, or even to one who appears to be clothed with authority.[1] Each case of payment to one other than the vendor, must of necessity be dependent for its validity upon the peculiar facts surrounding the transaction.

Payment to an attorney has been held to be as effectual as it made to the vendor.[2] And an attorney has authority to receive payment as well after judgment as before,[3] but his authority is limited to the receipt of money only.[4]

But if the vendor place one in a position to hold himself out to the public, or to an individual, as an agent, the vendor is bound by the acts of said agent, whether authorized or not—the doctrine of estoppel preventing the denial of the agent's apparent authority.[5] Thus, payment to a clerk in vendor's place

of business, apparently clothed with authority to accept payment, would be payment to the vendor.[6] Where the usages or customs of a business are known to the public, the agent is presumed to have the full powers commonly exercised by an agent therein.[7] Or where, in former dealings sanctioned by the vendor, payment of bills have been made to an agent, payment to the agent under similar circumstances would be payment to the vendor.[8]

(1) Willmott *v.* Smith, M. & M. 238; Harris *v.* Simmerman, 81 Ill. 413; Eclipse Windmill Co. *v.* Thorson, 46 Iowa, 181.

(2) Branch *v.* Burnley, 1 Cal. 147.

(3) Brackett *v.* Norton, 4 Conn. 517; Erwin *v.* Blake, 8 Pet. 18; Gray *v.* Wass, 1 Greenl. 257; Lewis *v.* Gamage, 1 Pick. 347.

(4) Savoury *v.* Chapman, 8 Dowl. 656; Jackson *v.* Bartlett, 8 Johns. 361; Kellogg *v.* Gilbert, 10 Johns. 220; Carter *v.* Talcot, 10 Vt. 471; Wilson *v.* Wadleigh, 36 Me. 496.

(5) Lewis *v.* Bourbon, 12 Kan. 186; Dodge *v.* McDonnell, 14 Wis. 553; Booth *v.* Wiley, 102 Ill. 84; Airey *v.* Okolona Sav. Inst., 33 La. Ann. 1346; Nicholson *v.* Moog, 65 Ala. 471; Amer. Merchants' Exp. Co. *v.* Milk, 73 Ill. 224; Kingsley *v.* Fitts, 51 Vt. 414; Kelton *v.* Leonard, 54 Vt. 230.

(6) Barrett *v.* Deere, Moody & M. 200; Leslie *v.* Knickerbocker Life Ins. Co., 63 N. Y. 27, 34; Swire *v.* Francis, 3 App. Cas. 106; Phillip *v.* Aurora Lodge, 87 Ind. 505; White *v.* Leighton, 15 Neb. 424; Haskins *v.* Swain, 61 Cal. 338.

(7) Bishop on Contracts, § 1103; Minor *v.* Mechanics' Bank, 1 Pet. 46, 70; Pickering *v.* Busk, 15 East, 38; Whitehead *v.* Tuckett, 15 East, 400; Wright *v.* Solomon, 19 Cal. 64; Chouteaux *v.* Luch, 6 Harris (Penn.), 224; York Co. Bank *v.* Stein, 24 Md. 447; Williams *v.* Getty, T. Casey (Penn.), 461; Mount Olive Cemetery *v.* Shubert, 2 Head, 116.

(8) Watts *v.* Divor, 1 Grant (Penn.), 267; Farmers' Mut. Ins. Co. *v.* Taylor, 23 Smith (Penn.), 342; Davis *v.* Lane, 10 N. H. 156; Miller *v.* Moore, 1 Cranch C. C. 471.

ARTICLE 9.—EXPRESS CONDITIONS.

§ 38. Sales on Trial or Approval.
§ 39. Memorandum Sales.
§ 40. Payment, Delivery Without.
§ 41. Special Cases.
§ 42. Railroad Equipment.
§ 43. Statutory Requirements.

§ 38. **Sales on Trial or Approval.** In this class of cases there is no sale until the approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial.[1] The mere failure to return the goods within the time specified for trial, makes the sale absolute,[2] but the vendee is entitled to the full time agreed on for trial.[3] No definite period of trial having been agreed upon, a reasonable time will be presumed or implied.[4] However, the time for trial having been designated in the contract, the vendee can not avoid payment because he failed to make trial within the time so designated,[5] nor will the exercise of an arbitrary discretion release him.[6] Where the vendee, by contract, is to have one day for trial, the word day means the entire day.[7] Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question for the jury, whether the quantity consumed was more than necessary for trial, for, if so, the sale will have become absolute by reason of the approval implied from thus accepting a part of the goods.[8]

(1) Nowbray *v.* Cody, 40 Iowa, 604; McCormick *v.* Bassal, 50 Iowa, 523; Delamater *v.* Chappell, 48 Md. 244; Colton *v.* Wise, 17 Ill. App. 395.

(2) Benjamin on Sales, § 505; Humphries *v.* Carvalho, 16 East, 45; Johnson *v.* McLane, 7 Blackf. 501; Speckler *v.* Marsh, 36 Md. 222; Dewey *v.* Erie Borough, 14 Penn. St. 211; Aultman *v.* Theiver, 34 Iowa, 272;

Prairie Farmer Co. *v.* Taylor, 69 Ill. 440; Waters Heating Co. *v.* Mansfield, 48 Vt. 378.

(3) Aiken *v.* Hyde, 99 Mass. 183; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528.

(4) Story on Sales, § 128.

(5) Thomson-Houston Electric Co. *v.* Brush-Swan Electric L. and P. Co., 31 T. Rep. 535.

(6) Flint *v.* Cook, 102 Ind. 371.

(7) Fuller *v.* Schroeder, (Neb.) 31 N. W. Rep. 109.

(8) Benjamin on Sales, § 596.

§ 39. **Memorandum Sales.** Mercantile usage has given to these words a special significance; and, when appearing upon a statement of account, accompanying or following the delivery of personal property, they mean that the goods are sent to the vendee subject to his approval, title remaining in the vendor until the vendee indicates his approval or acceptance of the goods.

Evidence of usage or custom is competent, and if knowledge of it may be imputed to the vendee, it will be presumed that the parties contracted with reference to such usage, there being nothing in the contract to the contrary.[1] Accepting the definition given by mercantile usage, acceptance becomes an express condition to be performed before title passes.

The acceptance must be in fact, and by means intended to be conveyed to the knowledge of the vendor. It is not enough to prove that the proposal was assented to by a mental act, nor by conduct unknown, and not communicated to the vendor.[2] It is enough, however, to prove that the assenting party duly mailed, or delivered to the telegraph company, an unqualified assent; but it is not necessary to prove that the assent actually came to the vendor's knowledge.[3] But the right of the vendee to assent is extinguished if he make an assignment or part with

the possession of the goods,[4] for it is then beyond his power to carry out the terms of the contract.

The fact, however, that the goods were actually forwarded or delivered to the vendee before the receipt of the statement or letter containing the terms of sale, is not, necessarily, a waiver of the conditions of sale,[5] for it is clear that there may be an actual possession without conferring the right to possession.[6]

(1) Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446.
(2) White *v.* Corliss, 46 N. Y. 467.
(3) Vassar *v.* Camp, 11 N. Y. 441; Parks *v.* Cornstock, 59 Barb. 16: Trevor *v.* Wood, 36 N. Y. 307.
(4) Kraft *v.* Dullis, 2 Cin. S. C. Rep. 116.
(5) Shenk *v.* Saunders, 15 Gray, 37; Marston *v.* Baldwin, 17 Mass. 606; Hammett *v.* Lineman, 48 N. Y. 399.
(6) Warner *v.* Porter, 2 Disney, 126.

§ 40. **Delivery without Payment.** On a sale of personal property, where the right to receive payment before delivery is waived by the vendor, and immediate possession is given to the vendee, and yet, by express agreement, the title is to remain in the vendor until the payment of the price, such payment is strictly a condition precedent; and, until performance, the right of property is not vested in the vendee.[1] Even where it is agreed that the title to chattels paid for in part only, shall not pass until full payment, the sale is a conditional one.[2] The vendee can convey no title by sale, and the property may be reclaimed, in the hands of his innocent vendee, by the original vendor.[3] And the property is not subject to seizure by creditors of the vendee until they have paid or tendered the vendor the amount due.[4] But even a tender of the amount due will not avail to make a levy good, if the property has been taken possession of by the vendor.[5] In the case of Lewis *v.*

McCabe,[6] certain liquors were sold on condition that they were to remain the property of the vendors until paid for, but with the understanding that if any were sold by the vendees, who were retail dealers, before payment, the vendors could enforce the conditions only against what remained unsold. This was held to be a valid conditional sale, and that the vendors' title to the portion unsold was good as against an attaching creditor of the vendees.

Again, in the case of Blanchard *v.* Cooke,[7] the vendor sold a stock of goods, with the agreement that the title should remain in him until paid for; that, in case of payments being made upon account, title to the goods should vest in the vendee in proportion to the amount paid. That, as to the future additions to the stock, the vendor should be the owner of a fractional part thereof, which fractional part was at all times to bear the same proportion to the balance then due and unpaid that the whole amount of goods bore to the sum originally due. The contract contained no provision authorizing the vendor to take possession of the goods in case of default in payment. And, upon consideration, the court held that the contract was not a mortgage, and was not per se fraudulent or void as to creditors, and that the vendor was entitled to take possession of the entire stock, including additions, upon non-compliance by the vendee with the terms of purchase. But the vendor must not have been guilty of laches, in asserting his rights, nor his conduct have been such as to waive performance of the condition.[8]

The condition of payment is not waived by taking the vendee's notes for the price,[9] especially where the note recites the conditions.[10] Where delivery was not to be made until a part of the

price was paid, and the residue secured by sufficient indorsers on notes, if the goods are delivered before such indorsements are made, the vendor, after disposing of part of the notes, can not again assert his title to the goods.[11] But where, under a contract for the sale of chattels, a delivery of a portion of the property sold was made to the purchaser, under an agreement that a note should be given for the whole quantity, upon delivery of the residue at a future day, it was held that the delivery of the first parcel was conditional; and that, on the delivery of the residue, and the refusal of the vendee to give the notes and to deliver the first parcel on demand, an action of replevin might be sustained.[12]

Where time is the essence of the contract, failure to pay an installment on time entitles the vendor to possession.[13] And commencing suit for amount due on a conditional contract of sale, and the issuing of an attachment, does not amount to a waiver of the vendor's right to retake the goods.[14] But a forfeiture is waived where the vendor, after default, makes a new contract with the vendee and others, and receives from them all the past due installments;[15] however, waiver of one forfeiture is not evidence of waiver of subsequent forfeitures. And if one of the conditions be that the chattel should be kept at a certain place, and should not be removed therefrom, without the vendor's written consent, the requisite consent to its removal to another certain place having been once obtained, does not authorize a second removal to still another place.[16]

A conditional sale of a machine, under the terms of which the title does not pass to the vendee until the payments provided for are made, will not enable the mortgagee of the house in which the machinery

is placed, to sell at a foreclosure sale, under a mortgage of the house and all the machinery therein, or to be thereafter placed therein, although he had no notice of the terms of the sale of the machinery.[17] For it is well settled, that the lien which attaches to "after acquired property" is subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagee takes just such an interest in the property as the mortgagor acquired—no more, no less. And the mortgagor acquires no title until the terms of the sale shall have been complied with.[18] If the chattels be mortgaged by the vendee before the terms of sale are complied with, the mortgage confers no rights on the mortgagee, as against the paramount claim of the vendor.[19] Yet, it has been held that the vendee had a right to mortgage the property, which, upon his making the last payment and receiving the bill of sale, vested in him, so that the mortgage took precedence of an attachment.[20] However, the execution of such a mortgage before fulfilling the obligations of the contract, is an assumption of ownership, and the intent with which it is done is immaterial, so far as concerns the vendor's right to reclaim the property.[21]

One who sells a chattel, under an agreement that the property is to remain in the vendor until payment, may, in the absence of special statutes, repossess himself of the chattel without refunding partial payments that have been made;[22] however, it is his duty to notify the vendee of his claim, in order that the latter may pay or tender the amount claimed to be due.[23] But the right of the vendor to take the property, in case of default, does not confer upon the vendee the right to return the property.[24]

Conditional contracts of sale are not per se fraudu-

lent.[25] However, it has been held that secret liens which treat the vendor of personal property, who has delivered possession of it to the vendee, as owner until payment of the purchase money, can not be maintained; they are constructively fraudulent as to creditors.[26]

A transaction, in effect a conditional sale of chattels, may be afterward modified so as to make the contract a mortgage;[27] and, being so modified, would be governed by the statutes on that subject.

(1) Putnam *v.* Lamphier, 36 Cal. 151; Kohler *v.* Hayes, 41 Cal. 455; Marston *v.* Baldwin, 17 Mass. 606; Hussey *v.* Thornton, 4 Mass. 405; Reed *v.* Upton, 10 Pick (Mass.) 522; Heath *v.* Randall, 4 Cush. (Mass.) 195; Sargent *v.* Metcalf, 5 Gray (Mass.), 306; Blanchard *v.* Child, 7 Gray, 155; Dishon *v.* Bigelow, 8 Gray, 159; Currier *v.* Knapp, 117 Mass. 324, Fleeman *v.* McKean, 25 Barb. (N. Y.) 474; Herring *v.* Hoppock, 3 Duer (N. Y.), 20; Ballard *v.* Burgett, 40 N. Y. 316; Austin *v.* Dye, 46 N. Y. 500; Boon *v.* Moss, 70 N. Y. 465; Bennett *v.* Simms, 1 Rice (S. C.), 421; Reenes *v.* Harris, 1 Bailey (S. C.), 563; Bradshaw *v.* Thomas, 7 Yerg. (Tenn.) 497; Price *v.* Jones, 3 Head (Tenn.), 84, West *v.* Bolton, 4 Vt. 588; Bigelow *v.* Huntley, 8 Vt. 154; Manwell *v.* Briggs, 17 Vt. 176; Buckmaster *v.* Smith, 22 Vt 203; Root *v.* Lord, 23 Vt. 568; Armington *v.* Houstan, 38 Vt. 448; Goodwin *v.* May, 23 Ga. 205; Jowens *v.* Blandy, 58 Ga. 379, Shireman *v.* Jackson, 14 Ind. 459; Lester *v.* East, 49 Ind. 588; Bradshaw *v.* Warner, 54 Ind. 58; Bailey *v.* Harris, 8 Iowa, 331; Patton *v.* McCane, 15 B. Mon. (Ky.) 555; Comstock *v.* Smith, 23 Me. 202; Hotchkiss *v.* Hunt, 49 Me. 219; Dannefelser *v.* Weigel, 27 Mo. 45; Wangler *v.* Franklin, 70 Mo. 659; Clayton *v.* Hester, 80 N. C. 275; Logwood *v.* Hussey, 60 Ala. 417, Forbes *v.* Marsh, 15 Conn. 384; Sage *v.* Sleutz, 23 Ohio St. 1; Coll *v.* Seymour, Sabin & Co., 40 Ohio St. 670; Kutner *v.* Warner, 1 Wis. 141; Dunlap *v.* Gleason, 16 Mich. 158; Fosdick *v.* Schall, 99 U. S. 235; Harkness *v.* Russell, 118 U. S. 663.

(2) Forest *v.* Hamilton, 98 Ind. 91.

(3) Little *v.* Page, 44 Mo. 412; Ridgeway *v.* Kenneday, 52 Mo. 24; Sumner *v.* Cotley, 71 Mo. 121; Kenny *v.* Planer, 3 Daly (N. Y.), 131; Thompson *v.* Walker, 2 McCrary C. Ct. 33, Sumner *v.* Woods, 67 Ala. 139; s. c., 42 Am. Rep. 104; Fairbanks *v.* Eureka Co., 67 Ala. 109; Marquette Mfg. Co. *v.* Jeffery, 49 Mich. 283; Warner *v.* Roth, 2 Wy. 63; Harkness *v.* Russell, 118 U. S. 663; Sanders *v.* Kiber and Miller, 28 Ohio St. 630; Simpson *v.* Shackelford. (Ark.) 4 S. W. Rep. 165.

(4) City Bank *v.* Tufts, 63 Tex. 113; Tufts *v.* Cleveland, (Tex.) 3 S. W. Rep. 288.

(5) Sage *v.* Sleutz, 23 Ohio St. 1.

(6) Lewis *v.* McCabe, 49 Conn. 141; s. c., 44 Am. Rep. 217.
(7) Blanchard *v.* Cooke, (Mass.) 11 North-eastern Rep. 83.
(8) Robbins *v.* Phillips, 68 Mo. 100.
(9) Keinbockle *v.* Zugbaum, 5 Mont. 344; s. c., 51 Am. Rep. 59.
(10) Vaughn *v.* Hopson, 10 Bush (Ky.), 337.
(11) Ford *v.* Sproule, 2 A. K. Marsh. (Ky.) 528.
(12) Russell *v.* Minor, 22 Wend. (N. Y.) 659.
(13) Sere *v.* McGovern, 65 Cal. 244.
(14) Mathews *v.* Lucia, 55 Vt. 308.
(15) Hill *v.* Townsend, 69 Ala. 286.
(16) Gibbons *v.* Luke, 37 Hun (N. Y.), 576.
(17) Defiance Mch. Works *v.* Trisler, 21 Mo. App. 69.
(18) United States *v.* New Orleans Ry., 12 Wall. 362.
(19) Budlong *v.* Cattrell, 64 Iowa, 234.
(20) Carpenter *v.* Scott, 13 R. I. 477.
(21) Winchester *v.* King, 46 Mich. 102.
(22) Flich *v.* Warner, 25 Kan. 492.
(23) Cushman *v.* Jewell, 14 N. Y. Sup. Ct. 525.
(24) Appleton *v.* Norwalk Library Co., 53 Conn. 4.
(25) Cole *v.* Berry, 42 N. J. L. 308; s. c., 36 Am. Rep. 511.
(26) George *v.* Tufts, 5 Cal. 162.
(27) Griffith *v.* Morrison, 58 Tex. 46.

§ 41. **Special Cases.** A number of cases have been decided of late years that are of peculiar interest, because they apply especially to the particular class of personal property under consideration. For example, in the case of the sale of *stock*, on condition that it shall remain the vendor's property until the payment of the price, its increase accruing before the performance of the condition also belongs to the vendor, and it is not necessary to protect the title to said increase, as against a bona fide purchaser, that it should be mentioned in the memorandum of sale.[1] And where a *team of horses* were to remain the property of the vendor until paid for, it was held that a purchaser from the vendee, in good faith and without notice of the agreement, took subject thereto and acquired no better title than the original vendee.[2]

In the case of Nash *v.* Wearer, the sale of *reapers and mowers* was under consideration. The contract was as follows: "Received of N. five mowers, under bargain for the sale thereof, and for which I have given my notes; said N. neither parts with, nor do I acquire any title to said mowers until said notes are fully paid; and, in case of default, N. to remove said mowers." This was held to constitute a conditional sale, and not to require recording as a chattel mortgage.[3]

The sale of *threshing machines*, upon conditions that the title, ownership, or possession of the machine should not pass until the notes given for the purchase price should be paid in full, that the vendor should have power to declare the notes so given due at any time he should deem the debt insecure, and to sell the machine at public or private sale, and apply the proceeds upon the unpaid balance of the purchase price, was held to be conditional. That no property in the machine passed to the vendor until he had paid the price, and that the right to sell the property, and apply the proceeds as provided in the condition, did not divest the vendor of his right of property reserved thereby.[4] These conditions, as in the case of Harkness *v.* Russell,[5] were embodied in and made a part of the notes given at the time of delivery. In the latter case, the subject of sale was a *portable engine* and *saw-mill*, and the supreme court held that, in the absence of fraud, an agreement for a conditional sale of property, accompanied by delivery, is good and valid, as well against third persons as against the parties to the transaction. A bailee of personal property, who receives it under an agreement that he may purchase it on the performance of conditions on his part, can not convey title to it, or

subject it to execution for his own debts, until performance of the conditions on which the agreement to sell is made.

However, in First National Bank *v.* Carson,[6] the note in question contained a provision, among others, to the effect that, in case the property for which the notes were given should be removed from a designated place, then, and in that event, the notes should become due and payable. It was held that a promissory note must be certain as to the sum to be paid and the time of payment. An instrument intended as a promissory note, but not satisfying the requisites of one, may, if valid, be proved as a contract, and assigned as such; but the assignee will, in such case, succeed to only such rights as the payee had, the title so transferred being only an equitable one. Judge Sherwood, delivering the opinion of the court, says: "I do not think the contract is a negotiable promissory note. A promissory note must be certain as to the sum to be paid, and the time of payment. It is made dependent, until the contract matures, upon the fact of whether the defendant shall sell or remove the property for which the contract was made. Such a degree of uncertainty is not allowable in a promissory note."[7] It would therefore seem that all notes containing a provision authorizing the payee to declare them due upon the happening of some event, or the development of some condition of affairs, would be non-negotiable notes; and if assigned, the assignee would only succeed to an equitable title, and the contract or note would be subject to all the equities existing between the parties thereto.

In a contract for the sale of a *safe*, payment to be made at a future day set, the title to remain in the

vendor until paid for, the court held that the contract was not within the meaning of the Maine Revised Statutes (chap. 3, § 5), and that the safe remained the property of the vendor until paid for.[8]

Sales of *sewing machines*, on condition that the title is to remain in the vendor until payment of a certain sum in installments, and in default of such payments, or any of them, all sums previously paid to be forfeited, and the machine to be restored to the vendor, have been sustained and held to be valid conditional sales, and the rights of the vendor are not affected by replevin of the machines.[9] This class of sales of sewing machines would neither be chattel mortgages nor bailments;[10] and, the installments not being paid, the machine being voluntarily given up, the vendee has no right of action against the vendor for removing the same.[11]

Conditional sales of *pianos* have been sustained.[12] But where a piano is sold upon a monthly rental, title to remain in the vendor until a certain sum is paid, and the vendee fail to make the monthly payments, the vendor can have no right of action therefor; his remedy is to retake the piano and retain the money paid on it, if any.[13] And, where the vendee is allowed to assume the apparent ownership, the burden of proof is on the party claiming adversely, to show non-fulfillment of the conditions of sale.[14]

A transaction in form of a lease of an *organ* for a year, the amount of rent being equal to the value of the organ, was, in Vermont, treated as a conditional sale; but, not being recorded, as required by statute, and the organ being in the possession of the lessee or vendee, and there being nothing to put an attaching officer upon inquiry, it may be attached as the property of such vendee.[15] And in New York,

notwithstanding a written contract, which purports to be a lease, where payment is made by note, title passes.[16] Pennsylvania is the only state in which the conditional sale of *furniture* is not sustained. And in the case of Stadtfield *v.* Huntsman,[17] where the vendee failed to make any payment, and sold the furniture to a third person, who had no knowledge of the agreement, it was held that the latter took a valid title.

However, in other states, this doctrine does not prevail; but even where the contract provided that if the notes were not paid at maturity the vendor might retake the furniture, it has been held, in states recognizing the validity of conditional sales of furniture, that, notwithstanding the non-payment of the notes, such agreement did not authorize the vendor to enter the home of the vendee, in his absence, without his consent, and, without notice, take the furniture.[18]

(1) Clark *v.* Hayward, 51 Vt. 14.

(2) Walker *v.* Mitchell, 25 Hun (N. Y.), 527.

(3) Nash *v.* Weaver, 23 Hun (N. Y.), 513.

(4) Call *v.* Seymour, Sabin & Co., 40 Ohio St. 670.

(5) Harkness *v.* Russell, 118 U. S. 663.

(6) First National Bank *v.* Carson, 27 N. W. Rep. 589.

(7) Story on Bills and Notes, § 20; Bailey on Bills, 1; Fralick *v.* Norton, 2 Mich. 130; Beardsley *v.* Horton, 3 Mich. 566; Smith *v.* Kindall, 9 Mich 243; Bank *v.* Purdy, 22 N. W. Rep. 93.

(8) Morris *v.* Lynde, 73 Me. 88.

(9) Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57; Singer Mfg. Co. *v.* Cole, 4 Lea (Tenn.), 439; s. c., 40 Am. Rep. 20. See Wheeler & Wilson Mfg. Co. *v.* Heil, (Penn.) 8 Atlantic Rep. 616.

(10) Sumner *v.* Woods, 67 Ala. 139.

(11) Jinks *v.* Howe Sewing Mch. Co. 34 La. 1241.

(12) Meager *v.* Hollenberg, 9 Lea (Tenn.), 392; Redewell *v.* Gillen, (N. M.) 12 P. Rep. 872.

(13) Loomis *v.* Bragg, 50 Conn. 228; s. c., 47 Am. Rep. 638.

(14) Goodell *v.* Fairbrothers, 12 R. I. 233.

(15) Whitcomb *v.* Woodworth, 54 Vt. 544. See Hine *v.* Roberts, 48 Conn. 267; s. c., 40 Am. Rep. 170.

(16) Hintermister *v.* Lane, 27 Hun (N. Y.), 497.
(17) Stadtfield *v.* Huntsman, 92 Penn. St. 53; s. c., 37 Am. Rep. 661.
(18) Van Wren *v.* Flynn, 34 La. Ann. 1158.

§ 42. **Railroad Equipment.** No more important branch of the law of conditional sales has developed in late years than that involving railroad equipments. The first leading case on the subject was that of Fosdick *v.* Schall,[1] Mr. Chief Justice Waite delivering the opinion of the court. In that case, by the terms of the contract, the cars were to remain the property of the vendor until paid for, but settlement was to be made therefor by notes of the railway company, on delivery of each twenty-five cars, cars to be lettered and numbered as per directions of the general manager of the railway company. The cars were delivered, the notes given in settlement and part paid, when the road and equipment were taken possession of by a receiver, appointed by the court, upon the application of trustees to foreclose a mortgage, given at a date prior to that of the sale of the equipment in question, and covering the property the company then owned or might thereafter acquire.

Mr. Chief Justice Waite, delivering the opinion of the court, said: "It is contended that the mortgage created a subsisting and paramount lien on the cars as soon as they were put into the possession of the railroad company under the contract, and the reservation of title was void, under the laws of Illinois, because the contract was not recorded.

"It must be conceded, that contracts like this are held by the courts of Illinois to be, in effect, so far as the chattel mortgage act of the state is concerned, the same as though a formal bill of sale had been executed, and a mortgage given back to secure the

price. We had occasion to consider that question in Hervy et al. *v.* Rhode Island Locomotive Works (93 U. S. 664), and there held, following the Illinois decisions, that if such an instrument was not recorded, in accordance with the provisions of the chattel mortgage act (R. S. Ill., 1874, 711, 712), a lien like that of Schall would have no validity as against third persons.

"Whatever may be the rule in other states, this is undoubtedly the effect of the Illinois statute as construed by the courts of that state. In Green *v.* Van Buskirk (5 Wall. 307), this court also held, that where personal property is seized and sold under an attachment, or other writ issuing from a court of the state where the property is, the question of the liability of the property to be sold under the writ must be determined by the law of that state, notwithstanding the domicile of all claimants to the property may be in another state. Hervey *v.* Rhode Island Locomotive Works (supra), was also a case of seizure and sale under judicial process; and the language of the court, as expressed in its opinion delivered by Mr. Justice Davis, is to be construed in connection with that fact.

"As between the parties, notwithstanding the Illinois statute, the transaction is just what, on its face, it purports to be, 'a conditional sale, with a right of recission on the part of the vendor, in case the purchaser shall fail in payment of his installments—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien,' if it works a legal wrong to third parties. Murch *v.* Wright (46 Ill. 488). The question then is, whether these mortgagees occupy the

position of third parties within the meaning of that term as used in this statute.

"They are in no sense purchasers of the cars. The mortgage attaches, if at all, because they are 'after-acquired' property of the company; but as to that class of property, it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired—no more, no less.

"These cars were 'loose property, susceptible of separate ownership and separate liens,' and 'such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the the company, and paramount thereto.' United States *v.* New Orleans Railroad, 12 Wall. 362.

"The title of the mortgagees of this case, therefore, is subject to all the rights of Schall under his contract.

"The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever, in the end, it shall be found to concern; and, in the meantime, the court proceeds to determine the rights of the parties, upon the same principles it would if no change of possession had taken place.

"It follows, that the decree ordering a return of the cars to Schall was right. Whether, if the property is worth more than is due upon the contract of purchase, the mortgagees can obtain the benefit of the overplus, is a question we are not called upon to consider."

In Myer *v.* Car Company,[5] opinion by Mr. Chief

Justice Waite, the railroad company executed a mortgage to secure its bond, which was duly recorded, conveying all the property which it then possessed, or might thereafter acquire. A written contract was entered into, leasing, for a specified period and at a stipulated sum, payable monthly, certain cars. It also reserved, but did not exercise, the privilege of purchasing them at the original cost, at any time during the existence of the contract. The vendor retained the right to rescind the contract, if the company failed to pay the interest on its bonds. The contract was never recorded, but while it was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road, and used the cars in operating it. It was held that the contract was binding between the parties thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage, that the vendor was entitled to possession of the cars, and to compensation for their use by the receiver, payable out of the fund to the credit of the suit.

The case of Hervey *v.* The Rock Island Locomotive Works,[2] seems to be, and is, in apparent conflict with the authorities heretofore cited; but, in the language of Mr. Justice Bradley, delivering the opinion in Harkness *v.* Russell:[3] "This is not a correct conclusion, for it is apparent that the only points decided in that case were:

"*First.* That it was to be governed by the law of Illinois, the place where the property was situated.

"*Second.* That, by the law of Illinois, the agreement for continuing the title of the property in the vendors, after its delivery to the vendees, whereby the

latter became the ostensible owner, was void as against third persons.

The statute of Illinois, on the subject of chattel mortgages, has, undoubtedly, influenced this decision, as well as others rendered by the supreme court of said state. The statute declares that "No mortgage, trust deed, or other conveyances of personal property, having the effect of a mortgage or lien upon such property, is valid, as against the rights and interests of a third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded."

The case of Heryford *v.* Davis,[4] is another case of similar character to that of Hervey *v.* Rock Island Locomotive Works, and, in the language of Mr. Justice Bradley: "The whole question was as to the construction of the contract. This was in the form of a lease; but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons."

It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The cor-

rect determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or, what is called, sometimes, a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company."

The whole residue of the opinion is occupied with the discussion of the true construction of the contract, and, as we have stated, the conclusion was reached that it was not really a lease, nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price.

This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect third persons.

But, in the case of Harkness *v.* Russell, heretofore referred to, after an elaborate consideration of all the cases on the subject, the court announces the opinion that, in the absence of fraud, an agreement for a conditional sale of personal property, accompanied by delivery, is good and valid, as well against third persons as against the parties to the transfer. That the

bailee of personal property, who receives it under an agreement that he may purchase it on the performance of conditions on his part, can not convey title to it, or subject it to execution for his own debts until performance of the conditions on which the agreement to sell is made. However, in the late case of Porter *v.* Pittsburgh Steel Conpany,[6] Mr. Justice Blatchford, delivering the opinion, says: "Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decision of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of bona fine creditors, as against any contract between the furnisher of the property and the railroad property."[7]

In Ohio,[8] the subject is provided for by statute, requiring that no contract of or for the sale of railroad equipment, rolling stock, or other personal property (to be used in or about the operation of any railroad), by the terms of which the purchase-money, in whole or in part, is to be paid in the future, and wherein it is stipulated or conditioned that the title to the property so sold shall not vest in the vendee, but shall remain in the vendor until the purchase-money shall have been fully paid, shall be valid against creditors or innocent purchasers for value, unless recorded in the office of the secretary of state, or a copy thereof be filed in the office of said secretary of state, and when said contract is so recorded, or a copy thereof so filed as aforesaid, the title to the property so sold,

or contracted to be sold, shall not vest in the vendee, but shall remain in the vendor until the purchase-money shall have been fully paid, and such stipulation or condition shall be and remain valid, notwithstanding the delivery of the property to and its possession by such vendee.

It also provided, that in any written contract for the renting, leasing, or hiring of such property, it shall be lawful to stipulate or provide for a conditional sale of such property at the termination of such renting, leasing, or hiring, and to stipulate or provide that the rental reserved shall, as paid, or when paid in full, be applied to and treated as purchase-money; and, in such contract, it shall be lawful to stipulate or provide that the title to such property shall remain in the lessor or vendor until the purchase-money shall have been fully paid, notwithstanding delivery to and possession by the other party; subject, however, to the requirement as to recording or filing, contained in the foregoing section of the act.

(1) Fosdick *v.* Schall, 99 U. S. 235.
(2) Hervey *v.* Rock Island Locomotive Works, 93 U. S. 664.
(3) Harkness *v.* Russell, 118 U. S. 679.
(4) Heryford *v.* Davis, 102 U. S. 235.
(5) Meyer *v.* Car Company, 102 U. S. 1.
(6) Porter *v.* Pittsburgh Steel Co., 122 U. S. 267.
(7) Dunham *v.* Railway Co., 1 Wall. 254; Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 480, 482; United States *v.* New Orleans Railroad, 12 Wall. 362, 365; Dillon *v.* Barnard, 21 Wall. 430, 440; Fosdick *v.* Schall, 99 U. S. 235, 251.
(8) 1882 Laws of Ohio, Vol. 79, p. 45.

§ 43. **Statutory Requirements.** So rapid has been the development of the law of conditional sales, as announced by the courts, that legislatures have, in many states, sought to throw around such sales some statutory limitations or requirements. These stat-

utes can only apply to such contracts of sale as contain an express condition, and can not, from the very nature of mercantile transactions, apply to such contracts as have been held by courts to be impliedly conditional. For example, a merchant in New York sells, to a merchant residing in Ohio, a bill of goods, terms, "net cash." The law says it is a condition precedent, that the cash must be paid before title vests in the vendee.

Would it be contended for a moment that, in such sales, to be valid as against third persons, the contract, or a copy thereof, must, in compliance with the statute of Ohio, be duly authenticated by the vendor, and filed with a township clerk or the recorder at the resident city of the vendee? We think not, for the reason that it would greatly interfere with our commercial relations, would therefore be against public policy, and would be an unwarranted interference with interstate commerce.[1]

In many states, all conditional sales or leases, where the title is to depend upon any condition, must, to be valid as against third parties, be filed or recorded like mortgages of chattels.[2] In each instance the recording or filing of the terms of the sale must be in the town or township where the vendee resides, except in the states of New Hampshire, Vermont, and Nebraska, where, if the vendee is not a resident of the state, the filing or recording may be done where the vendor resides. In Vermont, such record must be made within thirty days of the sale, while in New Hampshire, the time is shortened to ten days. The effect of record will not extend beyond one year in Wisconsin and five years in Nebraska, unless it is renewed from time to time.

But, in other states,[3] the conditional sale seems to

be good; only a note or other evidence of indebtedness given therefor by the vendee is void as against the vendee's creditors and subsequent purchasers or mortgagees, unless such note or contract be recorded with the township clerk where the vendee resides. In New York and Minnesota, such record ceases to be notice after one year from the time the note or other evidence of indebtedness becomes due. However, in New York, these provisions do not apply to sales of household goods, pianos, engines, and machinery, if the contract of sale be executed in duplicate and one of the duplicates delivered to the vendee. In New Hampshire, it is further required that an affidavit of good faith, signed by both parties, should be appended to and recorded with the note or contract.

As to foreclosures, the legislators have but in few states prescribed the mode of procedure. In New York and Vermont, the vendor may retake the property thirty days after condition broken. But in Maine, the property is subject to redemption by the vendee, unless otherwise stipulated in the contract. It is by statute, in Missouri and Ohio, made unlawful for the vendor or lessor to take possession or seize the property without refunding the sums actually paid by the lessee, less a reasonable compensation for use, in no case exceeding twenty-five per cent in the former state, and fifty per cent in the latter, of such sums paid, and for actual breakage or damage. In neither state have the courts of last resort given any interpretation to these very peculiar statutes. We are, however, constrained to think that they can only apply to cases where the vendor seeks to take possession without the intervention of the law. Surely, they can not, and do not, abridge or destroy any of the remedial rights which the vendor might have in an action

on a contract; and, in an action for foreclosure, an officer of the court could take possession of the property and sell the same at public sale, without tendering to the vendee a portion of what he might have previously paid to the vendor; but, as in the sale of property covered by chattel mortgage, the vendor could ask nothing more than the satisfaction of the amount actually due him.

A consignment of merchandise by a manufacturer to a merchant, to be sold on consignment,[3] and sales to an agent or sub-agent of the vendor,[4] have been held not to be such sales as come within the statutes.

(1) Brown *v.* Maryland, 12 Wheat. 436; Welton *v.* Missouri, 91 U. S. 275; Mobile *v.* Kimball, 102 U. S. 691; Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

(2) New York, 1884, 315, 1–2, and 1886, 495; Iowa, § 1922; Missouri, § 2505; California, § 169; South Carolina, § 2022; New Hampshire, 1885, 30; Vermont, § 1992; Nebraska, 1, 32, 26; North Carolina, § 1275; Ohio, 1885, p. 238; Wisconsin, § 2317; West Virginia, 96, 3; Texas, 1885, 78; Georgia, 1955; Alabama, § 1815.

(3) Minnesota, 39, 15, 6; 1883, 38, 2; 1885, 76; New York, ib. 3; New Hampshire, 1885, 30, 2.

(4) Peet *v.* Spencer (Mo.), 2 S. W. Rep. 434.

(5) South Bend Iron Works *v.* Cottrell, 31 Fed. Rep. 254.

CHAPTER V.

CONDITIONS SUBSEQUENT.

ARTICLE 10.—EXPRESS CONDITIONS.

§ 44. Sale or Return.
§ 45. Sale of Goods to Arrive.

§ 44. **Sale or Return.** The bargain called "sale or return," was explained by the queen's bench in Mass *v.* Sweet,[1] to mean a sale with a right on the part of the vendee to return the goods at his option, within a a reasonable time; and it was held, in that case, that the property passes, and an action for goods sold and delivered will lie if the goods are not returned to the vendor within a reasonable time.[2] And such is the holding of our courts.[3] What is a reasonable time, however, in the absence of any contract provision therefor, is a question of law for the court, to be determined by a view of all the circumstances of the particular case.[4] And it has been held that parol evidence of the conversations of the parties is admissible to show the circumstances under which the contract was made, and what the parties thought a reasonable time.[5]

Whether the vendee has terminated the sale, by the exercise of his privilege of returning the goods, is a question of fact, likewise to be determined by a view of all the circumstances of the particular case.[6] As in the case of Hall *v.* Ætna Mfg. Co.,[7] where the vendor refused to receive back a machine which failed to work as represented, and the vendee took it home, but notified the vendor to take it away, the sale was held to have been terminated.

"If the vendee materially impair the condition of the chattel, by misuse or otherwise, while it is in his keeping, and is thus unable to place the seller in statu quo, he can not, in general, take advantage of the condition under which it was delivered so as to rescind the contract;[8] but for an injury occasioned without the vendee's fault, as in the case of an animal taken under a bargain 'of sale and return,' the buyer has sometimes been held not to lose his privilege of return."[9]

(1) Moss *v.* Sweet, 16 Q. B. 493.

(2) Benjamin on Sales, § 597.

(3) Dearborn *v.* Turner, 16 Me. 17; Buswell *v.* Bicknell, 17 Me. 344; Perkins *v.* Douglass, 20 Me. 317; Walker *v.* Blake, 37 Me. 373, 375; Crocker *v.* Gullifer, 44 Me. 491, 493; Schlesinger *v.* Stratton, 9 R. I. 578; Buffum *v.* Merry, 3 Mason, 478; Ray *v.* Thompson, 12 Cush. 281; Jameson *v.* Gregory, 4 Met. (Ky.) 363; Chamberlain *v.* Sleeper, 101 Mass. 138; Sargent *v.* Gile, 8 N. H. 325, 328; Porter *v.* Pettengill, 12 N. 300, 301; Hurd *v.* West, 7 Cowen, 752; Washington *v.* Johnson, 7 Humph. 468; Johnson *v.* McLane, 7 Blackf. 501; Moore *v.* Purcy, 1 Jones (Law), N. C. 131; Wolf *v.* Dietzsch, 75 Ill. 205; Haase *v.* Nonemacher, 21 Minn. 486; Cahen *v.* Platt, 40 N. Y. Sup. Ct. 483.

(4) Attwood *v.* Clark, 2 Greenl. 249; Hill *v.* Hobart, 16 Me. 164; Murray *v.* Smith, 1 Hawks, 41.

(5) Crocker *v.* Franklin Hemp and Flax Mfg. Co., 3 Sumner, 530.

(6) Gammon *v.* Abrams, 53 Wis. 323.

(7) Hall *v.* Ætna Mfg. Co., 30 Iowa, 215; Padden *v.* Marsh, 34 Iowa, 522.

(8) Ray *v.* Thompson, 12 Cush. 281; 59 Am. Dec. 187; 20 Am. Law Reg., N. S. 245.

(9) Newmark on Sales, § 310; Benjamin on Sales, §§ 599, 599a.

§ 45. **Sale of Goods to Arrive.** There has been much discussion as to whether a sale of goods to arrive partook of the nature of an executed sale, subject to be defeated by the non-arrival of the goods, or of an executory contract to sell and buy. We are of the opinion, that it can be either—determinable in each case by the form of the contract.

The English decisions do not clearly settle when

the language used in such contracts shall amount to a condition precedent, nor even then what the condition shall be.[1] The leading case on this subject is one in which Judge Blackburn[2] delivered the opinion, and it may be accepted as authority in our American courts. He says:

"There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is, in such cases, at an end when he has delivered the goods to the carrier; and, if the goods perish in the carrier's hands, the vendor is discharged, and the purchaser is bound to pay him the price. If the parties intend that the vendor shall not merely deliver the goods, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination.

"But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so

that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part, in the one case, to procure the goods to arrive, or in the other, cause the tree to fall."

Where, therefore, the quantity, quality and price of the goods are specifically ascertained, and the bill of lading thereof is assigned by indorsement and delivery to the purchaser, we think that the general principles of the law merchant would lead to the conclusion that there was a constructive delivery and executed sale, and that the right of property passed.[3] It has been held, that if any other act of equivalent import to the assignment of a bill of lading be performed, as an assignment upon the back of the invoice, the transfer of a policy of insurance upon the goods, and the giving an order on the vessel to deliver to the vendee on arrival, the effect might be the same.[4]

But the tendency of the American cases is to regard contracts for the sale of goods to arrive, in the absence of acts or words to the contrary, as conditional and executory, title not passing until the actual arrival of the goods.[5]

(1) Benjamin on Sales, § 578–585; Blackburn on Sales, 230–239.

(2) Calcutta & Burmah Steam Nav. Co. *v.* De Motts, 32 L. J. Q. B. 328.

(3) Parsons on Contracts, p. 553, citing Caldwell *v.* Ball, 1 T. R. 205; Stubbs *v.* Lund, 7 Mass. 453; Walter *v.* Ross, 2 Wash. C. C. 283; Jordan *v.* James, 5 Ham. (Ohio) 89, Lee *v.* Kimball, 45 Me. 172.

(4) Gardner *v.* Howland, 2 Pick. 599; Howland *v.* Harris, 4 Mason, 497; Pratt *v.* Parkman, 24 Pick. 42; Lanfear *v.* Sumner, 17 Mass. 110.

(5) Benedict *v.* Field, 16 N. Y. 595; Neldon *v.* Smith, 7 Vroom, 148; Rodgers *v.* Woodruff, 23 Ohio St. 632; s. c., 13 Am. Rep. 276; Dike *v.* Reitlinger, 23 Hun, 241.

ARTICLE 11.—IMPLIED CONDITIONS.

§ 46. Shall be Manufacturer's own Make.

§ 46. Shall be Manufacturer's own Make. Mr. Benjamin, in his learned work on Sales, says:[1] "A reference should be made here to the important decision in Johnson *v.* Raylton,[2] where the majority of the court of appeal held, in opposition to two decisions of the court of session, in Scotland,[3] that, on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is (in absence of any usage in the particular trade, or, as regards the particular goods, to supply goods of other makers) an implied condition that the goods shall be those of the manufacturer's own make, and the purchaser is entitled to reject others, although they are of the quality contracted for."

(1) Benjamin on Sales, § 609.

(2) Johnson *v.* Raylton, 7 Q. B. D. 438, C. A.

(3) West Stockton Iron Co. *v.* Nielson, 17 Sc. L. R. 719; 7 Court Sess. Cas. (4th ser.) 1055; Johnson *v.* Nicoll, 18 Sc. L. R. 268; 8 Court Sess. Cas. (4th ser.) 437.

CHAPTER VI.

INCIDENTS—WARRANTIES.

ARTICLE 12.—IMPLIED WARRANTIES.

§ 47. Implied Warranty.
§ 48. Warranty of Title.
§ 49. Warranty of Quality.
§ 50. Sale by Sample.
§ 51. Sale by Description.
§ 52. Sale for Special Purpose.
§ 53. Merchantable Character.
§ 54. Soundness.

§ 47. Implied Warranty. A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty; but it is a collateral undertaking—a mere incident,[1] forming part of the contract by the agreement of the parties, express or implied.[2] For, as they are of two kinds, in respect to their subject-matter, warranty of title and warranty of quality, they are also of two kinds in respect to their form, as they may be expressed or implied.[3]

A mere contract of sale, or agreement to sell, does not imply a warranty,[4] and a warranty is not always inferrable from the price paid,[5] the element of intent being necessary to constitute a warranty.[6] It is only where there is no express warranty, that resort to an implied warranty can be had.[7] However, the taking of a written memorandum containing express warranties upon some points, does not thereby preclude the vendee from relying upon the warranty otherwise implied by law.[8] If the vendor refuses to warrant, there can be no pretense of raising an implied war-

ranty; but what amounts to a refusal to warrant must, in general, be submitted to a jury.[9] It has also been held, that evidence of usage is inadmissible to affect an implied warranty.[10]

The doctrine of implied warranties applies as well to property exchanged as to property sold,[11] and a warranty may even arise in case of an executory contract, where the defect in the property is incapable of discovery at the time of delivery. In such cases, the vendee may retain the property, and sue upon the warranty; but if the defect is openly visible and notorious at the time of delivery, the vendee is bound to reject the articles, and refuse to receive them as a compliance with the contract, or he will waive his right to damages.[12] For a warranty will not be implied to cover defects that are visible.[13]

In the absence of express warranty, when the vendee has an opportunity to inspect, and the vendor is guilty of no fraud, and is not the manufacturer of the article he sells, the maxim of "caveat emptor" applies, and there can be no implied warranty.[14] But the rule of "caveat emptor" does not apply to sales of drugs.[15]

(1) Osborn *v.* Grats, 60 N. Y. 540; Hopkins *v.* Tanqueray, 15 C. B. 139.

(2) Benjamin on Sales, § 610; Canter *v.* Hopkins, 4 M. & W. (Eng). 399; Foster *v.* Smith, 18 C. B. (Eng.) 156.

(3) Parsons on Contracts, 573.

(4) Harley *v.* Golden State Works, 66 Cal. 238.

(5) King *v.* Quidnick Co., 14 R. I. 131.

(6) Figge *v.* Hill, 61 Iowa, 430.

(7) Johnson *v.* Latimer, 71 Ga. 470.

(8) Boothby *v.* Scales, 27 Wis. 626.

(9) Rodrigines *v.* Habershaw, 1 Spears (S. C.), 314; Smith *v.* Bank of the State, Riley (S. C.), 113.

(10) Thompson *v.* Ashton, 14 Johns. 316; Dickinson *v.* Gay, 7 Allen, 29.

(11) Rivers *v.* Grugett, 1 McCord (S. C.), 100.

(12) Brown *v.* Burhans, 4 Hun (N. Y.), 227.

(13) Schuyler *v.* Ross, 2 Caines (N. Y.), 202; Jordan *v.* Foster, 11 Ark. 139; Birdseye *v.* Frost, 34 Barb. (N. Y.) 367; Hudgins *v.* Perry, 7 Ired. (N. C.) L. 102; Long *v.* Hicks, 2 Humph. (Tenn.) 305; Williams *v.* Ingram, 21 Tex. 300; Hill *v.* North, 34 Vt. 604.

(14) Lindley *v.* Hunt, 22 Fed. Rep. 52; Kohl *v.* Lindley. 39 Ill. 195; S. P. Humphreys *v.* Comline, 8 Blackf. (Ind.) 508; McGuire *v.* Kearney, 17 La. Ann. 295; Deming *v.* Foster, 42 N. H. 165; Moses *v* Mead, 1 Denio (N. Y.), 378.

(15) Jones *v.* George, 56 Tex. 149; s. c., 42 Am. Rep. 689.

§ 48. **Warranty of Title.** The generally accepted doctrine in this country is, that if one in possession of property sells it as his own, he warrants the title, unless the facts and circumstances of the case show that he did not intend to assert his ownership of it, but only to transfer his interest in the property.[1] Some courts even hold that the possession of a vendor of chattels is equivalent to an affirmation of title, and a warranty of title is implied, though not mentioned.[2] Others have held that a warranty of title is always implied in the sale of a chattel in the possession of the vendor,[3] even though nothing whatever is said about the title.[4]

Wherever there is a sale or exchange, or a giving in payment of property, unless waived by the contract, there is an implied warranty that the person so selling or exchanging, or giving in payment, is the owner of the thing sold, exchanged, or given. The same rule prevails in case of a settlement between debtor and creditor, where property wholly outside of the difference between the parties is given in payment.[5]

However, in every sale of chattels, if the possession at the time be in another, and there be no covenant of title, the rule of caveat emptor applies, and the vendee buys at his peril.[6] But if the vendor has possession of the article, and sells it as his own, and

not as the agent of another, and for a fair price, he is understood to warrant the title.[7] Constructive possession is sufficient. It is only necessary that the vendor have an adverse possession, and it is not essential that he have the immediate physical control of the property at the time of the sale.[8] But the implied warranty of title is broken if the vendor have neither title nor possession at the time of sale.[9]

If, however, the subject of sale is merely the vendor's title, and not the thing itself, there is no implied warranty of title. Therefore, if, after such a sale, the vendor acquire the full title, it will inure to the benefit of the vendee.[10]

But where the subject of sale is the exclusive right to manufacture an article, there is a warranty of title,[11] for without title the grant would be of no avail

Warranty of title to a chattel can not be implied or proved where there is a written bill of sale, which contains no warranty; for that would be to add to the writing by parol.[12] Where a vendee buys of a known agent, there is no warranty of title upon which recovery can be had against the principal.[13] Nor will a warranty of title be implied in a sale by an administrator, executor, or by a sheriff or other officer of the law.[14] For on execution sales there is neither an express nor implied warranty of title or soundness of the goods sold.[15]

(1) Butler *v.* Tufts, 13 Me. 302; Huntington *v.* Hall, 36 Me. 501; Thurston *v.* Spratt, 52 Me. 202; Bennett *v.* Bartlett, 6 Cush. 225; Emerson *v.* Brigham, 10 Mass. 202; Bucknam *v.* Goddard, 20 Pick. (Mass.) 71; Sargent *v.* Currier, 49 N. H. 310; Burt *v.* Dewey, 40 N. Y. 483; McNight *v.* Devlin, 52 N. Y. 399; Darst *v.* Brockway, 11 Ohio, 442; Lines *v.* Smith, 4 Fla. 47; Chancellor *v.* Wiggins, 4 B. Mon. 201; Williamson *v.* Summons, 34 Ala. 691; Storm *v.* Smith, 43 Miss. 497; Morris *v.* Thompson, 85 Ill. 16; Tutle *v.* White, 46 Mich. 299; Marshall *v.* Duke, 51 Ind. 62; Huckleman *v.* Harrison, 50 Ind. 156; Rice *v.* Forsyth, 41 Md. 389;

Whitaker *v.* Eastwick, 75 Penn St. 229; People's Bank *v.* Kurtz, 99 Penn. 344.

(2) Byrnside *v.* Burdett, 15 W. Va. 702.

(3) Williamson *v.* Sammons, 34 Ala. 691; Dicks *v.* Dillahunty, 8 Port. (Ala.) 133; Linton *v.* Porter, 31 Ill. 107; Chancellor *v.* Wiggins, 4 B. Mon. (Ky.) 201; Trigg *v.* Farris, 5 Humph. (Tenn.) 343; Charlton *v.* Hay, 5 Humph. 496; Goodkin *v.* Graham, 5 Humph. 480; Word *v.* Cavin, 1 Head (Tenn.), 506; Davis *v.* Smith, 7 Minn. 414; Robinson *v.* Rice, 20 Mo. 229.

(4) Gross *v.* Kurski, 41 Cal. 111.

(5) Gaylor *v.* Copes, 16 Fed. Rep. 49.

(6) Huntington *v.* Hall, 36 Me. 501; Pratt *v.* Philbrook, 32 Me. 23; McCoy *v.* Artcher, 3 Barb. (N. Y.) 323; Edick *v.* Crim, 10 Barb. 445; Scranton *v.* Clark, 39 N. Y. 220; Emmerson *v.* Brigham, 10 Mass. 202; Fletcher *v.* Darth, 66 Mo. 126; Long *v.* Hickingbottom, 28 Miss. 772; Storm *v.* Smith, 43 Miss. 497; Barton *v.* Flaherty, 3 G. Greene (Iowa), 327; s. c., 54 Am. Dec. 503; Lackey *v.* Stonder, 2 Ind. 376; Scott *v.* Hix, 2 Sneed (Tenn.), 192.

(7) 2 Kent's Commentaries, 478.

(8) Whitney *v.* Harwood, 6 Cush. (Mass.) 82; Shattuck *v.* Green, 104 Mass. 42; Palte *v.* Pelton, 48 Vt. 182; Byrnside *v.* Burdett, 15 W. Va. 702; Hunt *v.* Sackett, 31 Mich. 18.

(9) Tipton *v.* Triplett, 1 Met. (Ky.) 570.

(10) Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

(11) Costigan *v.* Hawkins, 22 Wis. 74.

(12) Sparks *v.* Missick, 65 N. C. 440. Contrary, Miller *v.* Van Tassil, 24 Cal. 450.

(13) Irwin *v.* Thompson, 27 Kan. 643.

(14) Mockbee *v.* Gardner, 2 H. & G. (Md.) 176; Brigham *v.* Maxey, 15 Ill. 295; Blood *v.* French, 9 Gray (Mass.), 197; Worthy *v.* Johnson, 8 Ga. 236; Harsby *v.* Baker, 10 Mo. 157; Hicks *v.* Skinner, 71 N. C. 539; Fore *v.* McKenzie, 58 Ala. 115; Harrison *v.* Shanks, 13 Bush (Ky.), 620; Savings Association *v.* O'Connor, 29 Ohio St. 654; Baker *v.* Arnot, 67 N. Y. 448.

(15) Hinsley *v.* Baker, 10 Mo. 157.

§ 49. **Quality.** The general rule is, that on a fair sale of personal property there is no implied warranty of quality. The rule, in such case, is caveat emptor, and the purchaser, in the absence of fraud, takes the risk of quality upon himself.[1] If the specific chattel has a potential existence at the time of the sale, and is inspected by the purchaser, and the sale is free from fraud, the rule above stated has no

exception,[2] nor will a warranty of quality be implied from payment of a full price.[3]

Where a vendor is so situated that he may be reasonably supposed to know the condition and quality of the goods, the vendee may reasonably rely upon such supposition. A rule of a board of trade that, in cash sales of provisions, the vendee may have them inspected at his own expense, and, if he accepts them without inspection, he takes them at his own risk, is unreasonable, and does not apply.[4]

Representations made by the vendor at the time of the sale, in respect to the quality of the thing sold, which are relied upon by the vendee, amount to a warranty.[5] But words of description in a contract or bill of parcels do not imply a contract of warranty that the property is of the kind and description specified.[6] Nor will a mere praise of personal property, indulged in by the vendor when offering it for sale, amount to an implied warranty of its quality or condition, if the vendee has an opportunity to examine it, and fails to do so, no artifice having been used by the vendor to prevent an examination.[7] For where goods are open to inspection, and are actually examined before the sale, there is no implied warranty of quality, though the vendor may be the manufacturer.[8] The same rule applies where goods have been in existence and in the vendee's custody for some time before the sale, and are then in his custody.[9]

Where one agrees to furnish an article similar to a certain model or design, there is no implied warranty of quality beyond conformity to the model or design.[10] Nor can a vendor who makes no warranty or assurance as to the thing sold, be answerable for defects latent, or otherwise, of which he had no knowledge.[11]

If the contract of sale is made solely by correspondence, the question of warranty of quality is for the court; and, although parol evidence is not admissible to contradict the agreement, the court may look not only to the language of the correspondence, but subject-matter of the agreement and surrounding circumstances, so as to be able to see the transaction as the parties themselves saw it.[12]

(1) Benjamin on Sales, § 611; Earley *v.* Gareett, 9 B. & C. (Eng.) 928; Ormrod *v.* Huth, 14 M. & W. (Eng.) 664; Mixer *v.* Coburn, 11 Metc. (Mass.) 559; French *v.* Vining, 102 Mass. 135; Dean *v.* Mason, 4 Conn. 428; Frazier *v.* Harvey, 34 Conn. 469; Sweet *v.* Colgate, 20 Johns. (N. Y.) 196; Moses *v.* Mead, 1 Denio (N. Y.), 378; Wright *v.* Hart, 18 Wend. 449; Kingsbury *v.* Taylor, 29 Me. 508; s. c., 50 Am. Dec. 607; Taymon *v.* Mitchell, 1 Md. Ch. 496; Lord *v.* Grow, 39 Penn. St. 88; Carson *v.* Bailie, 19 Penn. St. 375; s. c., 57 Am. Dec. 659; Warren *v.* Philadelphia Coal Co., 83 Penn. St. 437; Hadley *v.* Clinton Co., 13 Ohio St. 502; Roberts *v.* Hughes, 81 Ill. 130; Bowman *v.* Clemmer, 50 Ind. 10; Hadley *v.* Prather, 64 Ind. 137; Otis *v.* Anderson, 10 S. & M. (Miss.) 475; Bryant *v.* Pember, 45 Vt. 487.

(2) Chanter *v.* Hopkins, 4 M. & W. (Eng.) 64; Whittaker *v.* Eastwood, 75 Penn. St. 229; Palmer's Appeal, 96 Penn. St. 106; Hadley *v.* Prather, 64 Ired. 137; Deming *v.* Foster, 42 N. H. 165; Byrne *v.* Jansen, 50 Cal. 624.

(3) Mixer *v.* Coburn, 11 Metc. (Mass.) 559; S. P. Joslin *v.* Coughlin, 26 Miss. 134; Holden *v.* Dakin, 4 Johns. (N. Y.) 421; Welsh *v.* Carter, 1 Wend. (N. Y.) 185; Beirne *v.* Dord, 2 Sandf. (N. Y.) 89; Caldwell *v.* Smith, 4 Dev. & B. (N. C.) L. 64; Wetherill *v.* Neilson, 20 Penn. St. 448; Hadley *v.* Clinton Co., 13 Ohio St. 502; Eagan *v.* Call, 34 Penn. St. 236; Wilson *v.* Shackleford, 4 Rand. (Va.) 5.

(4) Chicago Packing Co. *v.* Tilton, 87 Ill. 547.

(5) Hahn *v.* Doolittle, 18 Wis. 196.

(6) Hotchkiss *v.* Gage, 26 Barb. (N. Y.) 141. See Hogins *v.* Plympton, 11 Pick. (Mass.) 97.

(7) Byrne *v.* Jansen, 50 Cal 624.

(8) Barnett *v.* Stanton, 2 Ala. 195.

(9) Dooley *v.* Gallagher, 3 Hughes, C. Ct. 214.

(10) Cosgrove *v.* Bennett, 32 Minn. 371.

(11) Neilson *v.* Dickinson, 1 Desau. (S. C.) 133.

(12) Dayton *v.* Hoogleind, 39 Ohio St. 671.

§ 50. **Sale by Sample.** A sale by sample is equivalent to a sale by description. It implies that the

goods sold are of the quality of the sample. There being no opportunity to inspect the goods, the vendee relies upon the representation which the sample is made to carry. And, therefore, it is a rule that goods bought shall be equal to the sample by which they are sold.[1] In Pennsylvania, a sale by sample is a guaranty only that the article to be delivered shall follow its kind and be merchantable.[2] Yet a stipulalation that a future delivery will equal a sample, may become a condition of the contract.[3]

Where a sample of goods is exhibited by a vendor, and an opportunity is given to examine the bulk from which it was taken, although it be inconvenient to make the examination, there is not in this fact alone sufficient grounds upon which to establish a sale by sample. Consequently, sale by sample must exclude an opportunity for inspection,[4] and there must be evidence that a sale by sample was intended.[5] For it is not a sale by sample unless both parties deal with the sample with mutual understanding that the bulk is like it, and unless they do so the doctrine of caveat emptor applies.[6] But whether a sale is by sample or not, is a question of fact to be left to the jury.[7]

Where a vendor is not a manufacturer of goods sold by sample, there is no implied warranty against latent defects in both the sample and the bulk of the goods.[8] But, in an action by the vendee for the value of the goods, he must show that they correspond with the sample.[9] And it has been held that the vendee of goods sold by sample, is entitled to a reasonable time after their arrival to test their quality, and, if defective, in an action by the vendor for the price, might set up damages for breach of warranty, though not offering to return the

goods, but, on the contrary, retaining and using them.[10]

(1) Dike *v.* Reitlinger, 23 Hun, 241; Simond *v.* Braddon, 2 C. B. (N. S.) 324; Clen *v.* McPherson, 1 Bosw. (N. Y.) 480; Bradford *v.* Manley, 13 Mass. 139; Magee *v.* Billings, 3 Ala. 679; Dayton *v.* Hooglund, 39 Ohio St. 671; Voss *v.* McGuire, 18 Mo. App. 477; Hughes *v.* Bray, 60 Cal. 284.

(2) Selser *v.* Roberts, 105 Penn. St. 242; West Republic Mining Co. *v.* Jones, 108 Penn. St. 55; Ryan *v.* Ulmer, 108 Penn. St. 332; s. c., 56 Am. Rep. 210.

(3) Selser *v.* Roberts, 105 Penn. St. 242; West Republic Mining Co. *v.* Jones, 108 Penn. St. 55.

(4) Berine *v.* Dord, 1 Seld. 95; Dargons *v.* Stone, 1 Seld. 73; Sands *v.* Taylor, 5 Johns. 395.

(5) Selser *v.* Roberts, 105 Penn. St. 242.

(6) Proctor *v.* Spratley, 78 Va. 254; Reynolds *v.* Palmer, 21 Fed. Rep. 433.

(7) Jones *v.* Wasson, 59 Tenn. 211; Thorne *v.* McVeigh, 75 Ill. 81.

(8) Dickinson *v.* Gay, 7 Allen, 29.

(9) Hollinder *v.* Koetter, 20 Mo. App. 79.

(10) Marsh *v.* McGreevy, 23 Hun (N. Y.), 408.

§ 51. **Description.** Where a vendor of goods represents them, at the time of sale, to be an article known in the market by a particular name, and the vendee purchases relying upon the statements, without having an opportunity to examine, or where an examination would not enable him to discover whether the goods agreed with the representations, a warranty is implied that the goods are of the kind, character, and description represented.[1] So, also, a mere sale of an article, which the vendee has not seen, by a specific description whose meaning is known to the parties, implies a guaranty that the article, when delivered, shall be of the particular description.[2] But it is not necessary that the article, when delivered, should be of any certain quality of the brand or description sold; for, in the absence of fraud, the vendor can only be called upon to deliver articles of the specified brand.[3]

(1) Van Wyck *v.* Allen, 69 N. Y. 61. See also Section 30, on Sales by Description.

(2) Catchings *v.* Hacke, 15 Mo. App. 51; Whitaker *v.* McCormick, 6 Mo. App. 114.

(3) Dounce *v.* Dow, 64 N. Y. 411.

§ 52. **Special Purpose.** Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the vendee necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied.[1] So, too, upon the sale of an article by the manufacturer, there is an implied warranty that it will answer the purpose for which it was made.[2] But if a vendee inspects for himself the specific article sold, and there is no express warranty, and the vendor is guilty of no fraud, and is not himself the manufacturer of the article, and the particular use which is to be made of it is not communicated by the purchaser at the time of the sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose to which it is to be applied, although the vendor supposes that the vendee intends to use it for the purpose for which he in fact buys it.[3]

If a manufacturer undertakes to manufacture for a special purpose, there is an implied warranty of the manufacturer that the article is fit for the special purpose intended by the vendee; and if a chattel be manufactured to supply the order of another, who does not advise the manufacturer of any special purpose for which it is designed, and it is manufactured and delivered to the purchaser, there would be an implied warranty that it was reasonably fit for the purpose for which it was ordinarily used.[4] This rule

is, however, limited to those cases where the article is not only ordered for a particular purpose, but where the manufacturer, knowing the purpose, undertakes to meet the requirements, and the buyer trusts to the judgment and skill of the manufacturer. If one orders an article manufactured for some particular purpose known to the manufacturer, and it is manufactured in accordance with specific directions given, and delivered to the purchaser, there would be no implied warranty that it would answer the purpose for which it was intended by the vendee.[5] It is sufficient if the article so manufactured fill the terms of the contract.[6]

Again, it has been held that a manufacturer who, for a fair price, undertakes with a vendee to manufacture an article for a particular purpose, impliedly warrants that it will reasonably perform all the operations and purposes that articles of the particular kind contracted for would perform, but not that it will perform what articles of a different kind, though of the same general class, would perform.[7] But if the manufacturer of an article sell it for a particular purpose, the vendee making known to him at the time the purpose for which he buys it, the vendor thereby warrants it fit for such purpose, and free from latent defect.[8] This rule has been applied to the sale of steam boilers,[9] the sale of leather by a manufacturer to a shoemaker,[10] the sale of pianos to a dealer,[11] the sale of a wind-mill,[12] and the sale of whisky barrels.[13] But, like all good rules, this too has exceptions; for example, the material to be used being specified, the manufacturer is not liable, as upon an implied warranty of the sufficiency of the material designated, there being no proof that he did not exercise ordinary diligence in selecting material.[14]

And the principle that if an article is ordered for a special purpose, and is sold for that purpose, there is an implied warranty that it is fit for that purpose, does not apply to cases where a special thing is ordered, although intended for a special purpose.[15] The same is true of the sale of specific articles, selected by the vendee, there being no implied warranty that they will answer the purpose for which bought.[16]

Where an agreement is for the sale of a specific chattel in its then state, there is no implied warranty of its fitness or merchantable quality.[17] But if sold for a particular purpose, there would be an implied contract that the article was suitable and proper for such purpose,[18] and a failure of such warranty is ground for rescission of a contract based upon it. In defense to an action for the price, the vendee is not estopped from setting up a breach of the warranty, because the articles had been received and partly paid for, in ignorance of their unfitness.[19] However, the vendee seeking a rescission for failure of warranty, when it is his duty to expend labor and skill in order to render the articles fit for the purpose of their original construction, impliedly warrants that the unfitness of the article is not occasioned by any fault of his own.[20]

(1) Brown *v.* Edgington, 2 Man. & G. 279; Jones *v.* Bright, 5 Bing. 533; Harris *v.* Waite, 51 Vt. 480; Rease *v.* Sabin, 38 Vt. 432; Hoe *v.* Sanborn, 21 N. Y. 552; Brown *v.* Murphie, 31 Miss. 91; Overton *v.* Phelan, 2 Head (Tenn.), 445; Walton *v.* Cody, 1 Wis. 420; Thomas *v.* Simpson, 80 N. C. 4; Robinson *v.* Chandler, 56 Ind. 575; Gibbs *v.* Hall, 53 Ga. 635; Gammell *v.* Gunby, 52 Ga. 504; Lespard *v.* Van Kirk, 27 Wis. 152; Hight *v.* Bacon, 126 Mass. 10; Archdale *v.* Moore, 19 Ill. 565; Rice *v.* Forsyth, 41 Md. 389.

(2) Brown *v.* Murphie, 31 Miss. 91; Cunningham *v.* Hall, 1 Sprague, 404; Beers *v.* Williams, 16 Ill. 69; Brenton *v.* Davis, 8 Blackf. (Ind.)

317; Boyd *v.* Crawford, Add. (Penn.) 150; Overton *v.* Phelan, 2 Head (Tenn.), 445; Walton *v.* Cody, 1 Wis. 420.

(3) Hight *v.* Bacon, 126 Mass. 10.

(4) Bigge *v.* Parkinson, 7 H. & N. (Eng.) 955; Brown *v.* Edgington, 2 M. & G. (Eng.) 279; Jones *v.* Bright, 5 Bing. (Eng.) 533; Randall *v.* Newson, 2 Q. B. D. (Eng.) 102; Kingsbury *v.* Taylor, 29 Me. 508; Pacific Iron Works *v.* Newhall, 34 Conn. 67; White *v.* Miller, 71 N. Y. 118; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Chicago Packing Co. *v.* Tilton, 87 Ill. 547; Pacific Guano Co. *v.* Muller, 66 Ala. 582; Brown *v.* Murphie, 31 Miss. 91; Field *v.* Kinnear, 4 Kan. 476.

(5) Chanter *v.* Hopkins, 4 M. & W. (Eng.) 399; Olivant *v.* Bayley, 5 Q. B. (Eng.) 288; Tilton Safe Co. *v.* Tisdale, 49 Vt. 83; Pease *v.* Salim, 38 Vt. 432; Deming *v.* Foster, 42 N. H. 165; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Hargus *v.* Stone, 5 N. Y. 73; Wright *v.* Hart, 18 Wend. 449; Walcott *v.* Mount, 36 N. J. L. 262; Port Carbon Iron Co. *v.* Groves, 68 Penn. St. 149; Mason *v.* Chappell, 15 Gratt. (Va.) 572; Girst *v.* Jones, 32 Gratt. 518; Brown *v.* Murphie, 31 Miss. 91; Rodgers *v.* Niles, 11 Ohio St. 48; Gammell *v.* Gunby, 52 Ga. 504; Sims *v.* Howell, 49 Ga. 620.

(6) Fisk *v.* Tank, 12 Wis. 276.

(7) Robinson Machine Works *v.* Chandler, 56 Ind. 575; Harris *v.* Waite, 51 Vt. 480.

(8) Lespard *v.* Van Kirk, 27 Wis. 152.

(9) Rodgers *v.* Niles, 11 Ohio St. 48; Brown *v.* Sayles, 27 Vt. 227; Page *v.* Ford, 12 Ind. 46; Street *v.* Chapman, 29 Ind. 142.

(10) Dowining *v.* Dearborn, 77 Me. 457.

(11) Snow *v.* Schomacker Mfg. Co., 69 Ala. 111; s. c., 44 Am. Rep. 509.

(12) McClamrock *v.* Flint, 101 Ind. 278.

(13) Poland *v.* Miller, 95 Ind. 387; s. c., 48 Am. Rep. 730.

(14) Shoenberger *v.* McEwen, 15 Ill. App. 496.

(15) Port Carbon Iron Co. *v.* Groves, 68 Penn. St. 149. See also Ulrich *v.* Stohrer, 12 Phila. (Penn.) 199.

(16) Walker *v.* Pue, 57 Md. 155; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.

(17) Broom's Legal Maxims, 614.

(18) Brown *v.* Sayles, 27 Vt. 227; Beals *v.* Olmstead, 24 Vt. 114; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 515; Newberry *v.* Wall, 65 N. Y. 484; Moses *v.* Mead, 1 Denio (N. Y.), 378; Witmore *v.* Iron Co., Allen (Mass.), 58; Brenton *v.* Davis, 8 Blackf. (Ind.) 317; Bird *v.* Mayor, 8 Wis. 362; Weiger *v.* Gould, 86 Ind. 180; Rice *v.* Forsyth, 41 Md. 389; Howie *v.* Rea, 70 N. C. 529; Wilcox *v.* Hall, 53 Ga. 635; Sims *v.* Howell, 49 Ga. 620; Robson *v.* Miller, 12 S. C. 586; Byers *v.* Chapin, 28 Ohio St. 300.

(19) Thomas *v.* Simpson, 80 N. C. 4.

(20) Byers *v.* Chapin, 28 Ohio St. 300.

§ 53. **Merchantable Character.** Where merchandise is sold to arrive, which neither party can inspect, it would be contrary to sound morality and public policy to enforce the doctrine of "caveat emptor," and compel the purchaser to pay for goods of an unmerchantable quality. The first principle of the civil law, "caveat venditor," should be applied in such cases. There is an implied engagement in the contract itself, that the article sold should be merchantable.[1]

The same is true where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not the opportunity of inspecting; it is an implied term in the contract that he shall supply a merchantable article.[2] And where one sells goods under circumstances to justify the vendee in believing them to be of the vendor's own manufacture, a rule of a board of trade will have no application to prevent a warranty of their merchantable quality, as implied by law.[3]

But the rule is not limited to manufacturers; it is extended to cases where one merchant contracts to supply goods of a specific description to another merchant or dealer.[4] Especially is this true where the merchandise is not seen by the vendee,[5] or an examination is impracticable.[6] For there is no implied warranty of the merchantable character of an article of which the vendor is not the manufacturer, and in regard to which the vendee has equal opportunity for knowledge.[7] As to complete contracts, it is a general rule that, unless there has been a warranty, false representations, or fraudulent concealment, the vendee must take the property regardless of its defects; while, as to executory sales, the contract always carries an obligation that the article sold shall be

merchantable, at least without any unreasonable defect.[8]

Though the vendee, in the absence of express stipulation, can not insist that the article shall be of any special degree of fineness, yet he has a right to insist that it shall be of medium quality or goodness, free from such defects as would render it unmerchantable, or unfit for the purpose for which it is ordinarily used.[9] This rule has been applied to sales of wheat,[10] guano, or superphospate,[11] ice,[12] and lumber.[13] But the rule does not apply to sales of the residuum or refuse of manufacturing establishments. It is often the subject of sale, but the quality of such refuse matter is entirely subordinate to the process which is the main object of the manufacturer; and, on such a sale, there is no implied warranty that the article, when delivered, shall be of a merchantable quality, as a manufactured article.[14]

(1) Newbery *v.* Wall, 35 N. Y. Sup. Ct. 106.

(2) Laing *v.* Fidgeon, 4 Camp. (Eng.) 169; Jones *v.* Just, L. R. 3 Q. B. (Eng.) 197; Randall *v.* Newson, 2 Q. B. Div. 102; Shephard *v.* Paybus, 3 Man. & G. 868; Babcock *v.* Trice, 18 Ill. 420; Thomas *v.* Simpson, 80 N. C. 4; Cunningham *v.* Hall, Sprague, 404; Chambers *v.* Crawford, Add. (Penn.) 150; Merriam *v.* Field, 39 Wis. 578; Leopold *v.* Vankirk, 27 Wis. 152; McClung *v.* Kelley, 21 Iowa, 508; Moore *v.* McKinlay, 5 Cal. 471; Pease *v.* Sabin, 38 Vt. 432; Harris *v.* Waite, 51 Vt. 480; Mann *v.* Everston, 32 Ind. 355; Hoe *v.* Sanburn, 21 N. Y. 552.

(3) Chicago Packing Co. *v.* Tilton, 87 Ill. 547.

(4) Jones *v.* Just, L. R. 3 Q. B. 197; Hanks *v.* McKee, 2 Litt. (Ky.) 227; Whittaker *v.* McCormick, 6 Mo. App. 114; Borrekins *v.* Bevan, 3 Rawle, 23; Jennings *v.* Gratz, 3 Rawle, 168; Ketchum *v.* Wells, 19 Wis. 34; Hawkins *v.* Pemberton, 51 N. Y. 148; Wyck *v.* Allen, 69 N. Y. 61; White *v.* Miller, 71 N. Y. 118; Lewis *v.* Rountree, 78 N. C. 323; Morehouse *v.* Comstock, 42 Wis. 626; Port Carbon *v.* Groves, 68 Penn. St. 149; Walcott *v.* Mount, 9 Vroom, 496; Flint *v.* Lyons, 4 Cal. 474; Messenger *v.* Pratt, 3 Lans. 234.

(5) Howard *v.* Hoey, 23 Wend. (N. Y.) 350.

(6) Hyatt *v.* Boyle, 5 Gill & Johns. 110; Hart *v.* Wright 17 Wend. 267.

(7) Bartlett *v.* Hoppock, 34 N. Y. 118.

(8) McClung *v.* Kelley, 21 Iowa, 508; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Clew *v.* McPherson, 1 Bosw. (N. Y.) 480.

(9) Howard *v.* Hoey, 23 Wend. 351; Brown *v.* Sayles, 27 Vt. 227.

(10) S. P. Babcock *v.* Trice, 18 Ill. 420; Fish *v.* Roseberry, 22 Ill 288.

(11) Sims *v.* Howell, 49 Ga. 620; Gammell *v.* Gumby, 52 Ga. 504.

(12) Warner *v.* Arctic Ice Co., 74 Me. 475.

(13) Merriam *v.* Field, 39 Wis. 578.

(14) Holden *v.* Chancey, 58 Barb. (N. Y.) 590.

§ 54. **Soundness.** That a sound price implies a warranty of soundness of the property which extends to defects known and unknown,[1] is a much questioned doctrine;[2] and it has been held that the doctrine of implied warranty, from the soundness of the price, relates only to secret defects which can not, by ordinary skill and diligence, be discovered.[3] Such a warranty is not excluded by a written contract of sale containing an express warranty of title.[4] But no evidence of a custom or usage is admissible to show that the sale of any particular article implies a warranty of goodness of that article.[5]

The sale of a chattel by the maker, implies a warranty against latent defects growing out of the process of manufacture.[6] But where it is sold with the understanding that it is unsound from any cause, and, in consequence of such understanding, it sells for less than it would otherwise have brought, no general implication of warranty of soundness arises, unless the vendor has been guilty of deceit, or such false representation as was calculated to suppress free inquiry, or lull the suspicions of a reasonable man.[7] For a vendor is liable if he knows of a defect in the chattel sold, which is unknown to the vendee, and does not disclose it.[8]

Where perishable goods are sold, to be shipped to a distant market, a warranty is implied that they are properly packed and fit for such shipment, but not

that they will continue sound for any particular or definite period. The implied warranty will not cover unforeseen contingencies,[9] nor will proof of the worthlessness of the goods received be allowed to defeat the vendor's claim for the purchase price.[10]

On a sale of provisions by the quantity, as merchandise, there is no implied warranty that the whole is sound.[11] For a warranty that provisions are wholesome and fit for consumption, if implied at all, is implied only where they are sold for consumption, or immediate domestic use, by the vendee, and not where they are sold as merchandise.[12] When sold for immediate domestic use, the vendor, at his peril, is bound to know that they are sound and wholesome; and if they are not so, he is liable to an action on the case, at the suit of the vendee.[13]

(1) Mitchell *v.* Dubose, 1 Treadw. (S. C.) Const. 360; Crawford *v.* Wilson, 2 Treadw. (S. C.) Const. 353; Lester *v.* Graham, 1 Treadw. (S. C.) Const. 182; Whitefield *v.* McLeod, 2 Bay (S. C.), 380; State *v.* Gaellard, 2 Bay, 19; Timrod *v.* Schoolbred, 2 Bay, 324; Barnard *v.* Yates, 1 Nott. & M. (S. C.) 142; Eastland *v.* Longshorn, 1 Nott. & M. 194; Missroom *v.* Waldo, 2 Nott. & M. 76; Thompson *v.* Lindsley, Mill (S. C.) Const. 236; Calcock *v.* Reid, 3 McCord (S. C.) 513; Bailey *v.* Nicholls, 2 Root (Conn.), 407.

(2) Johnson *v.* Cope, 3 Har. & J. (Md.) 90; Penniman *v.* Pierson, 1 D. Chip. (Vt.) 394; Dean *v.* Mason, 4 Conn. 428; Cozzins *v.* Whittaker, 3 Stew. & P. (Ala.) 322; Defreeze *v.* Trumper, 1 Johns. (N. Y.) 274; Holden *v.* Dakin, 4 Johns. (N. Y.) 421; Boyd *v.* Whitfield, 19 Ark. 447; Loris *v.* Long, Tayl. (N. C.) 17.

(3) Rose *v.* Beatie, 2 Nott. & M. (S. C.) 538; Bragg *v.* Morrill, 49 Vt. 45; Hoult *v.* Baldwin, 67 Cal. 610.

(4) Wood *v.* Ashe, 3 Strobh. (S. C.) 64; Trimmier *v.* Thomson, 10 S. C. 164.

(5) Thompson *v.* Ashton, 14 Johns. (N. Y.) 316.

(6) Hoe *v.* Sanborn, 21 N. Y. 552.

(7) Watson *v.* Burrill, 1 Rich. (S. C.) 402.

(8) McGarock *v.* Ward, Cooke (Tenn.), 403. But see Oneida Mfg. Co. *v.* Lawrence, 4 Cow. (N. Y.) 440.

(9) Mann *v.* Everston, 32 Ind. 355.

(10) Richardson *v.* Bouck, 42 Iowa, 185.

(11) Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83; Emerson *v.* Brigham, 10

Mass. 197; Moses *v.* Mead 1 Den. (N. Y.) 378; s. c., 5 Den. 617; Hyland *v.* Sherman, 2 E. D. Smith (N. Y.), 234.

(12) Ryder *v.* Neitge, 2 Minn. 70.

(13) Van Bracklin *v.* Fonda, 12 Johns. (N. Y.) 467; Hover *v.* Peters, 18 Mich. 51.

ARTICLE 13.—EXPRESS WARRANTIES.

§ 55. What Amounts to a Warranty.
§ 56. What Does Not Amount to Warranty.
§ 57. Effect of Warranty.
§ 58. Breach of Warranty, and Rescission.
§ 59. When Action Lies for Breach.
§ 60. When Action Does Not Lie for Breach.
§ 61. Measure of Damages.

§ 55. **What Amounts to a Warranty.** Although, to constitute a warranty, the term warrant need not be used, and no precise form of expression is required, yet there must be an affirmation, to the quality or condition of the thing sold, made by the vendor at the time of the sale, for the purpose of assuring the vendee of the truth of the fact affirmed, and inducing him to make the purchase, which affirmation is so received and relied upon by the vendee.[1] There is, however, a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an opinion. When the representation is positive,[2] and relates to a matter of fact,[3] it constitutes a warranty; but where it relates to that which is a matter of opinion, or fancy, it does not amount to a warranty unless there are other declarations which leave no doubt of the intention to warrant.[4] Whether a particular representation was a warranty, or a mere expression of opinion, depends on what was the understanding or intention of the parties.[5] For if the vendor, at the time of the sale, makes representations, or assertions, on which he intends the vendee to rely, and on which he does

rely, it is a warranty.[6] But such representations of the vendor, to be relied on to make a warranty, must be so made as to authorize the vendee to understand that the vendor intended to be bound by them, and must have been relied upon by the vendee.[7] However, it has been held that any assertion or affirmation respecting the quality of the article, made by the vendor to the vendee, during the negotiations to effect the sale, will be regarded as a warranty, if relied on by the vendee.[8]

Whether what passed between the parties amounted to a warranty, or was merely a recommendation or expression of opinion, is a matter for the jury to determine, unless the language used has a fixed or technical meaning.[9] The question for the jury is not whether the vendor intended to warrant, but whether he did warrant, and this is to be determined by the language used.[10] Yet the intent to warrant may be inferred from the words used, the circumstances, and the subject-matter.[11] But the question, as to whether an express warranty was, or was not made, is one alone for the jury to determine, on the weight of the evidence.[12]

Where a vendor makes representations to the vendee concerning the kind or quality of the article sold, on which the vendee relies, and is known to the vendor to rely, and on which the vendor intended and expected that he should rely—the article not being present or subject to inspection, and the vendee having no other means of information than the statements of the vendor—such representations will be held a warranty.[13] So, the use of the word "Haxall" in a sale note of flour, has been held a warranty that the flour was "Haxall;"[14] and the use of the words, "good milling wheat," constitutes a warranty as to

quality.[15] Representations by a vendor, upon a sale of flour in barrels, that it is in quality superfine;[16] of fruit, that it was first-class;[17] of oil, that it was prime winter oil;[18] and of the sale of wool in sacks, marked on the sacks and described in the invoice, as being of a certain quality,[19] have each been held, as a matter of law, to amount to a warranty of quality. And an agreement by the vendor of a heater, "to protect the sale from infringement on other heaters," has been construed as a warranty that the article sold was not an infringement of any patent.[20] Representations by the vendor of the quality of the thing sold, or of its fitness for a particular purpose, intended as a part of the contract of sale, and relied upon by the vendee, constitute a contract of warranty.[21] For example, representations by the vendor of a patent screw for elevating hay, "that it would work in all kinds of hay, grain, straw, and other grass," and was, "in all respects, fit for the use intended," were held to amount to a warranty;[22] so, also, where machinery was ordered for a special purpose,[23] or the goods to be manufactured are to correspond in quality to certain other goods,[24] or the material furnished to a manufacturer is to be equal in quality to any brand of the same material.[25]

Misrepresentations as to the character and condition of articles sold, made to influence the bargain, and having that effect, are equivalent to warranties, whether made innocently or fraudulently, and whether inserted in the written contract of sale or not.[26] Nor will the representations, which would be sufficient to constitute a warranty, be deprived of that character by the fact that they were false and fraudulently made.[27] But a transaction can not be characterized as a warranty and a fraud at the same time—a war-

ranty rests upon a contract, while fraudulent representations have no element of contract in them, but are essentially a tort.[28]

Where a bill of parcels is given, upon a sale of goods, or describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be; and this rule applies, though the goods are examined by the purchaser at or before the sale, if they are so prepared, and present such an appearance, as to deceive skillful dealers.[29] A warranty may also be created by a reasonable and established custom or usage of trade,[30] or by reference to a printed warranty contained in a circular.[31]

Any thing may, by contract, be made the subject of warranty, as the value of the article, if a material fact.[32] But a warranty of title, in a bill of sale, is an exclusion of all other warranties,[33] although it has also been held that an express warranty of property can not be fairly construed to intend an exclusion of the natural implied warranty of soundness.[34]

A warranty may be verbal, or in writing,[35] and may be made while the parties are in treaty for the sale, although the sale does not take place until some days afterward.[36] And a vendor will be bound by an express warranty of quality, distinctly made at the close of the negotiation, although, in the course of the previous conversation, he may have stated the truth on the same point.[37] A warranty made after a contract of sale is completed is inoperative, unless there is some new consideration, distinct from that of the sale, to sustain it.[38]

An agent who is authorized to sell a manufactured article for the makers, may bind them by an express

warranty, notwithstanding any private instructions which are unknown to the purchaser.[39] A joint owner of personal property is not bound by the false representations or false warranty of the other joint owners, unless expressly authorized by them.[40] But where a joint owner of property, authorized to sell, warrants the soundness of the property, which is found to be defective, and the seller pays for the defect without suit, the other joint owner is bound to contribute to the loss in proportion to his interest.[41]

(1) Hawkins *v.* Berry, 10 Ill. (5 Gilm.) 36; S. P. Ender *v.* Scott, 11 Ill. 35; Randall *v.* Thornton, 43 Me. 226; Marsh *v.* Webber, 13 Minn. 109; Morrill *v.* Wallace, 9 N. H. 111; Bryant *v.* Crosby, 40 Me. 9; Sweet *v.* Bradley, 24 Barb. (N. Y.) 549; Blakeman *v.* Makay, 1 Hilt. (N. Y.) 266; Foggart *v.* Blackweller, 4 Ired. (N. C.) L. 238; Beals *v.* Olmsted, 24 Vt. 114.

(2) Carter *v.* Black, 46 Mo. 384.

(3) Polhemus *v.* Heiman, 45 Cal. 573.

(4) Reed *v.* Hastings, 61 Ill. 266.

(5) Patrick *v.* Leach, 8 Neb. 530.

(6) Dickens *v.* Williams, 2 B. Mon. (Ky.) 374.

(7) Torkelson *v.* Jorgenson, 28 Minn 383.

(8) Neane *v.* Arntz, 56 Wis. 174.

(9) Murray *v.* Smith, 4 Daly (N. Y.), 277; Bradford *v.* Bush, 10 Ala. 386; Terhune *v.* Diver, 36 Ga. 648; Wheeler *v.* Reed, 36 Ill. 81; McFarland *v.* Newman, 9 Watts (Penn.), 55; Kinley *v.* Fitzpatrick, 5 Miss. (4 How.) 59; Morrill *v.* Wallace, 9 N. H. 111; Baum *v.* Stevens, 2 Ired. (N. C.) L. 411; Foggart *v.* Blackweller, 4 Ired. (N. C.) L. 238.

(10) Smith *v.* Justice, 13 Wis. 600.

(11) Thorne *v.* McVeigh, 75 Ill. 81.

(12) Boothby *v.* Scales, 27 Wis. 626.

(13) Warren *v.* Van Pelt, 4 E. D. Smith (N. Y.) 202.

(14) Flint *v.* Lyon, 4 Cal. 17; Bertram *v.* Lyon, 1 McAll. 53; Webber *v.* Davis, 44 Me. 147.

(15) Jack *v* Des Moines & Fort Dodge R. R. Co., 53 Iowa, 399.

(16) Carley *v.* Wilkins, 6 Barb. (N. Y.) 557.

(17) Scott *v* Raymond, 31 Minn. 437.

(18) Hastings *v.* Lovering, 2 Pick. (Mass.) 214.

(19) Richmond Trading & Mfg. Co. *v.* Farquar, 8 Blackf. (Ind.) 89.

(20) Croninger *v.* Paige, 48 Wis. 229.

(21) Richardson *v.* Grandy, 49 Vt. 22.

(22) Elkins *v.* Kenyon, 34 Wis. 93.
(23) Whitehead & Atherton Mche. Co. *v.* Ryder, 139 Mass. 366.
(24) Brigg *v.* Hilton, 11 Daly (N. Y.) 335.
(25) Park *v.* Morris Co., 41 How. (N. Y.) Pr. 18.
(26) Waterbury *v.* Russell, 8 Baxter (Tenn.), 159.
(27) Rose *v.* Hurley, 39 Ind. 77.
(28) Carter *v.* Abbott, 33 Iowa, 180.
(29) Henshaw *v.* Robins, 9 Metc. (Mass.) 83; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495.
(30) Fatman *v.* Thompson, 2 Disney (Ohio), 482.
(31) Snow *v.* Schomacker Mfg. Co., 69 Ala. 111; s. c., 44 Am. Rep. 509.
(32) Pickard *v.* McCormick, 11 Mich. 68.
(33) Wren *v.* Wardlaw, Minor (Ala.), 363.
(34) Houston *v.* Gilbert, 3 Brev. (S. C.) 63; Wells *v.* Spears, 1 McCord (S. C.), 421; Hughes *v.* Banks, 1 McCord (S. C.), 537.
(35) Lindsay *v.* Davis, 30 Mo. 406.
(36) Wilmot *v.* Hurd, 11 Wend. (N. Y.) 584.
(37) Deming *v.* Foster, 42 N. H. 165.
(38) Summers *v.* Vaughan, 35 Ind. 323; Congar *v.* Chamberlain, 14 Wis. 258; Towell *v.* Gatewood, 3 Ill. (2 Scam.) 22.
(39) Boothby *v.* Scales, 27 Wis. 626.
(40) Holmes *v.* Wood, 32 Ind. 201.
(41) Davis *v.* Burnet, 4 Jones (N. C.) L. 71.

§ 56. **What Does Not Amount to a Warranty.** As was shown in the preceding section, in order to constitute an express warranty, it is not necessary to use any particular term, if the vendor intends, by his language, to warrant, or bind himself, that the article in question is as represented.

But a mere affirmation that a thing is good or sound, a general praise, commendation, opinion, or belief, does not amount to a warranty when not so intended.[1]

If a representation is made, in the course of a negotiation for a sale, and the contract of sale is afterward reduced to writing and signed, and does not contain the representation, it is excluded from the contract, and does not amount to a warranty.[2] For parol evidence is not admissible to add a warranty to a written con-

tract of sale.[3] A written warranty, gratuitously given after the sale of personalty, will not supersede an oral and different one given at the time of the sale.[4] Nor can the vendee of an article rely upon statements made by the manufacturer, in circulars relating to the article, as a warranty that it will do what is therein stated.[5]

The warranty of any thing sold, as to quality, is no warranty of its value.[6] And where the vendee purchases a chattel at sight, which the vendor affirms to be worth much more than its real value, no action lies, there being no express warranty.[7] For statements as to price and value, by the vendor, are not so jealously watched in law as statements as to title and quality.[8]

A representation, made by a vendor, respecting the property sold, may relieve the vendee from the use of that care, caution, and observation that he would be bound to exercise if no representations were made; but, in case of warranty, an obvious defect is not cured by the warranty, because the law requires the vendee to examine the property with that degree of care and skill that men generally are capable of exercising in respect to property they are proposing to purchase. The same principle should apply in case of false representations. If the property is present, and nothing is said or done by the vendor to induce the vendee not to examine it, and the falsity of the representations is palpable to the senses, the vendee can not be permitted to omit examination, and justify his omission by the representation.[9] If the representations made upon the sale of an article prove utterly false, that will not amount to a warranty in itself, but it is for the jury to say whether the representations were fraudulently made.[10]

All representations made by the vendor to the vendee, at the time of sale, do not amount to a warranty.[11] The assertion or affirmation of a vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies on, and one which is understood by the parties as an absolute assertion, and not the expression of an opinion.[12] For example, statements by a vendor of an apparatus to be used in connection with a fuel for stoves, that it was of great value; that in its use there was no dirt, or smoke; that it burned a long time, and could be run for small expense; and that experiments had been made therewith which had proved successful, were held to be mere statements of opinion, and fall within what is known as "dealer's talk," and are not sufficient foundation for an action for deceit, unless the vendee has been fraudulently induced to omit an examination of the apparatus for himself.[13] In the absence of fraud, or any showing of fraud, a representation by the vendor of a patent plow stock, that the plow would sell well in Mississippi or any-where else;[14] a statement by the vendor of a stock of goods that, in his belief, the cost of the goods sold would amount to a certain sum;[15] the description of iron sold as mill iron, in a bill rendered to the vendor;[16] and the description of tobacco, in a bill of sale, as good first and second rate tobacco,[17] have each been held to be mere statements or expressions of opinion, not amounting to a warranty. So, the use of the words, "approved standard quality," in a contract of sale of merchandise;[18] and the use of the words, "blue vitriol, sound, and in good order," in a sale of vitriol in casks,[19] have been hold not to raise an express warranty, they having

been used merely as a commercial designation, or expression, for a merchantable article.

A bill of parcels, designating merchandise sold as of a particular kind, imposes no obligation as to quality, but only as to kind.[20] Where the contract does not specify the goods, but only the quality of the goods to be delivered, there is no warranty that the goods shall be of the quality mentioned; and the failure to comply with the contract is not a breach of warranty, but of contract.[21] And an express warranty of quality excludes an implied warranty that the article is fit for its intended purpose.[22] A public officer, making an official sale, makes no warranty, unless, by an express contract.[23]

(1) O'Neal *v.* Bacon, 1 Houst. (Del.) 215; S. P. Moore *v.* McKinlay, 5 Cal. 471; Adams *v.* Johnson, 115 Ill. 345; Jones *v.* Quick, 28 Ind. 125; Hillman *v.* Wilcox, 30 Me. 170; Kinlay *v.* Fitzpatrick, 5 Miss. (4 How.) 59; Morrill *v.* Wallace, 9 N. H. 111; McGregor *v.* Penn, 9 Yerg. (Tenn.) 74; Otts *v.* Alderson, 18 Miss. (10 Sme. & M. Ch.) 476; Oneida Manufacturing Co. *v.* Lawrence, 4 Cow. (N. Y.) 440; Roberts *v.* Morgan, 2 Cow. (N. Y.) 438; Chapman *v.* March, 19 Johns. (N. Y.) 290; Whitney *v.* Sutton, 10 Wend. (N. Y.) 411; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Henson *v.* King, 3 Jones, (N. C.) L. 419; Weimer *v.* Clement, 37 Penn. St. 147.

(2) Randall *v.* Rhodes, 1 Curt. 90.

(3) Rice *v.* Forsyth, 41 Md. 389.

(4) Aultman *v.* Kennedy, 33 Minn. 339.

(5) Bermen *v.* Woods, 38 Ark. 351.

(6) Lightburn *v.* Cooper, 1 Dana (Ky.), 273.

(7) David *v.* Meeker, 5 Johns. (N. Y.) 354.

(8) Simpson *v.* Wiggins, 3 Woodb. & M. 413.

(9) Vandawalker *v.* Osmer, 65 Barb. (N. Y.) 556.

(10) Bigler *v.* Flickinger, 55 Penn. St. 279.

(11) Leonard *v.* Peoples, 30 Ga. 61.

(12) Hakins *v.* Pemberton, 51 N. Y. 198; Horton *v.* Green, 66 N. C. 596; Ricks *v.* Dillahunty, 8 Port. (Ala.) 133; Baum *v.* Stevens, 2 Ired. (N. C.) L. 411; Bond *v.* Clark, 35 Vt. 577.

(13) Kimball *v.* Bangs, (Mass.) 11 N. E. Rep. 113.

(14) Baldwin *v.* Daniel, 69 Ga. 782.

(15) Tenny *v.* Cowles, (Wis.) 31 N. W. Rep. 221.

(16) Carondelet Iron Works *v.* Moore, 78 Ill. 65.

(17) Towell *v.* Gatewood, 3 Ill. (2 Scam.) 22.
(18) Cohen *v.* Platt, 4 N. Y. Sup. Ct. 483.
(19) Hawkins *v.* Pemberton, 6 Robt. (N. Y.) 42.
(20) Gunther *v.* Atwell, 19 Md. 157.
(21) Ricketts *v.* Hays, 13 Ind. 181.
(22) International Pavement Co. *v.* Smith, 17 Mo. App. 264; McGraw *v.* Fletcher, 35 Mich. 104.
(23) Commissioners *v.* Thomson, 4 McCord (S. C.), 434.

§ 57. **Effect of a Warranty.** On a sale of a chattel, with a warranty, express or implied, in the absence of fraud on the vendor's part, if the article is not as warranted, the vendee may return it, or offer to return it, within a reasonable time, where the time is not fixed by special contract, and thus defeat the vendor's right to recover any part of the price; or may keep the chattel, and, in an action for the price, recoup damages for breach of the warranty.[1] But a vendee of property, to be delivered at a future day, may, by taking an express warranty, at the time of the purchase, that the goods, when delivered, shall possess the particular qualities which it is important for him to secure, relieve himself from the obligation to return the property on discovering its inferiority, and still hold the vendor responsible for the deficiency in quality.[2] He can not, however, relieve himself from the obligation to pay for the goods, by the exercise of an arbitrary opinion as to the quality. The defect must be such as to amount to a breach of contract. Where the contract provides that if the goods did not correspond to the warranty, the vendor was to be notified, and, if he could not make them satisfactory, they could be returned; but if, after ninety days, they suited the vendee, he was to pay for them on the terms specified, it was held that the vendee could not, by the exercise of an arbitrary discretion, release himself from the obligation to pay.[3]

And, where the warranty extends to a certain time, the vendee can not retain and use the goods after the time of warranty had expired, without becoming liable to pay.[4]

An express warranty extends to all defects, whether known or unknown to the vendor, unless they be such as a common vendee might have observed at the time of the sale.[5]

And a general warranty of soundness may cover even patent defects, where intended so to be covered.[6] It has also been held, that a warranty of title draws to it any after acquired right of the warrantor.[7]

If a sale is with warranty, the vendor is bound to deliver the articles of the stipulated quality, and the examination and appropriation of some of the articles by the vendee, when they are delivered, does not amount to a waiver of the contract.[8] Nor is he bound to rescind on discovering a breach, but may use the goods and rely on the warranty;[9] and, in an action by the vendor for the price, may recover the damages found to have been suffered by reason of the breach of warranty.[10]

Where an executory contract for the sale of material, to be manufactured into articles of merchandise, is with warranty of its fitness for the purpose intended, the vendee, upon receipt, is not bound to apply tests before using; but if defects, not open and visible, are thereafter discovered, which amount to a breach of the warranty, he has his remedy thereon.[11]

Or, if the goods are purchased upon a warranty as to quality, for the purpose of combining with other material, to be manufactured into articles of merchan-

dise, and, on using part, they prove to be defective and worthless, and, upon comparison, it is found that the remainder are of the same general character and apparent quality, the vendee is justified in refusing to further use them, and is not liable for the purchase price.[12] If a vendor, in selling goods which he knows to be designed by the vendee for a particular use, warrants them to be "perfect," this must be construed to mean that they are perfect for the use intended.[13]

A manufactur who sells machinery not made by himself, with a warranty that it is in good condition, and, if not found so, shall be placed in such condition, puts himself in a position analogous to that of one who contracts to build and furnish.[14] If the sale be of milling machinery, which is warranted to make flour "to satisfy the trade" of the vendee, the trade meant is the trade in and around the place where the mill is situated.[15] It is a fundamental principle of law that has never been departed from, that when the obligations of an express warranty are concurrent, the party who seeks to enforce the obligations of the other must prove performance on his part, or an offer to perform.[16] Yet the obligations of a warranty may be waived; and if the vendee accepts the goods after examination, there being no fraud on the part of the vendor, he can not afterward, on account of a breach of the warranty, rescind the contract and return the goods, in the absence of any agreement to that effect.[17] But where the vendor becomes liable for a breach of warranty, the mere fact that his vendee had other business transactions with him, and did not insist on payment for the breach, will not amount to a waiver.[18]

(1) Warder *v.* Fisher, 48 Wis. 338.

(2) Woodley *v.* Davis, 63 Barb. (N. Y.) 500.

(3) Flint *v.* Cook, 102 Ind. 391.

(4) Bristol *v.* Tracy, 21 Barb. (N. Y.) 236; Webster *v.* Phœnix Insurance Co., 36 Wis. 67; Abbott *v.* Johnson, 2 N. W. Rep. 332; Nichola *v.* Hail, 4 Neb. 210; Miller *v.* Nichols, 5 Neb. 478; Pitts Sons Mfg. Co. *v.* Spitsnogle, 6 N. W. Rep. 71; Bayliss *v* Hennessy, 6 N. W. Rep. 46; J. I. Case Threshing Machine Co. *v.* Vennom, 23 N. W. Rep. 563.

(5) Ricks *v.* Dillahunty, 8 Port. (Ala.) 133.

(6) Fletcher *v.* Young, 69 Ga. 591.

(7) Curran *v.* Burdsall, 20 Fed. Rep. 835.

(8) Willings *v.* Consequa, Pet. C. Ct. 301.

(9) Brigg *v.* Hilton, 99 N. Y. 517; s. c., 52 Am. Rep. 63.

(10) Henkel *v.* Burke, (Me.) 10 Am. Rep. 249.

(11) Dounce *v.* Dow, 57 N. Y. 16.

(12) Cooper *v.* Hall, (Neb.) 34 N. W. Rep. 349.

(13) Roe *v.* Bacheldor, 41 Wis. 360.

(14) Kimball Mfg. Co. *v.* Vroman, 35 Mich. 310.

(15) Knowlton *v.* Oliver, 28 Fed. Rep. 516.

(16) Dunham *v.* Pette, 8 N. Y. 508; Nichols *v.* Knowles, 18 N. W. Rep. 413; Wendall *v.* Osborne, 18 N. W. Rep. 709; Warden *v.* Sycamore Harvester Co., 7 N. W. Rep. 756.

(17) Scranton *v.* Mechanics Trading Co., 37 Cal. 130; McCormick *v.* Sarson, 45 N. Y. 265.

(18) Snow *v.* Shomacker Mfg. Co., 69 Ala. 111.

§ 58. **Breach of Warranty, and Rescission.** A latent defect, existing at the time of the sale, which, by the occurrence of natural circumstances develops into a serious injury, is a breach of warranty.[1] As, in the case of a warranty on the sale of a soda fountain, that it was in good condition, the warranty is broken if, from an inherent defect in its construction, existing at the time of the sale, it was liable to get out of order from time to time, and from that cause failed to answer the purpose for which it was designed, although it was in a good condition to make soda water on the day of the sale.[2] If, however, accompanying a sale, there is a warranty that the article, if set up in a certain manner or location, and operated in a certain way, will prove satisfactory, and such warranty is accepted as part of the contract of sale,

before advantage can be taken of it, the vendee must have tested it after it had been set up in such a manner and location.[3]

One seeking the rescission of a contract because of fraudulent representations, must offer to rescind promptly on discovering the fraud.[4] Or, if a breach of warranty occurs, and the vendee elects to rescind, he must offer to return the consideration or thing received,[5] unless it be worthless,[6] and notify the vendor of his election to rescind.[7] And if the vendor be a resident of a foreign state, an attempt must be made to give him notice through the post-office.[8] If rescision is claimed for default of performance in either party, good faith requires that notice of the claim or purpose to rescind be given wherever an omission so to do would reasonably lead the defaulting party to incur trouble or expense in future performance; and, if the notice be not given, and further performance is induced by such silence, the right to rescind will be deemed waived.[9] Keeping the property an unreasonable time, without objection, will also be deemed a waiver; and it has been held, that where the vendee kept the property two months, without objection, he was bound to pay for it, there being no fraud.[10]

(1) Hook *v.* Stovall, 21 Ga. 69.

(2) Pritchard *v.* Fox, 4 Jones (N. C.) L. 140.

(3) Exhaust Ventilator Co. *v.* C. M. & St. P. Ry. Co., (Wis.) 28 N. W. Rep. 343.

(4) Parmlee *v.* Adolph, 28 Ohio St. 10.

(5) Weed *v.* Page, 7 Wis. 503; Christy *v.* Cummins, 3 McLean, 386; Coghill *v.* Boring, 15 Call, 213; Bigelow on Fraud, 408–424.

(6) Fleetwood *v.* Dorsey Mche. Co., 95 Ind. 491.

(7) Smalley *v.* Hendrickson, 29 N. J. L. 371; Dewey *v.* Erie Borough, 14 Penn. St. 211; Moral School Township *v.* Harrison, 74 Ind. 93; Paulson *v.* Osborne & Co., 27 N. W. Rep. 203.

(8) Dewey *v.* Erie Borough, 14 Penn. St. (2 Harris) 211.

(9) Seeds *v.* Simpson, 16 Ohio St. 321; Kirby *v.* Harrison, 2 Ohio St. 326.

(10) Percival *v.* Blake, 2 C & P. 514. See Grimaldi *v.* White, 4 Esp. 96; Groning *v.* Mendham, 1 Stark. 257; Hopkins *v.* Appleby, 1 Stark. 477; Kellog *v.* Denslow, 14 Conn. 411.

§ 59 **When Action Lies for Breach.** Money may be recovered which has been paid for goods sold on a warranty, express or implied, that they are of a specified kind or quality, when they prove to be of a different kind, or inferior quality, after a return, or an offer to return them, though the vendor were innocent,[1] for the right of action arises under the contract irrespective of fraud on the part of the vendor.[2] But money so paid can not be reclaimed, where the property is of any value, unless the vendee first returns or offers to return it.[3]

If, however, the vendee elects to keep the property, he could maintain an action for breach of warranty;[4] and, in that case, the damages would be the difference between the real value of the property, at the time of the sale, and the amount paid, or agreed to be paid.[5] If he sues for a breach of warranty he affirms the contract, and thereby admits his liability for the agreed price, less the damages caused him by the breach of warranty.[6]

Where there is an express warranty, an acceptance of the goods, after opportunity to examine them, does not preclude the vendee from claiming and recovering damages for breach of the warranty,[7] even though a portion of the goods may have been used by the vendee after discovering the breach of warranty.[8] And if the action for damages for breach of warranty is brought within a reasonable time, the vendor can not defend on the ground that the bills for the goods bore a notice requiring all claims for damages to be made immediately.[9] The vendee can maintain an action for breach of warranty, although, after discover-

ing the breach, he paid the agreed price.[10] Nor will the vendee be deprived of his right of action, though a negotiable note, then unpaid, was given for the price of the goods purchased.[11]

In order that an action may be maintained for a breach of a covenant of warranty of the title to a chattel, the vendee need not have waited to be actually dispossessed. It is enough, if he could not have withheld the owner of the paramount title without becoming a wrong-doer.[12]

And if the true owner sues, and recovers judgment against the vendee for converting the property, the latter may recover on the covenant of warranty, without paying the judgment.[13]

(1) Bradford *v.* Manly, 13 Mass. 139; Conner *v.* Henderson, 15 Mass. 319; Martin *v.* How, 2 Treadw. (S. C.) Const. 750.

(2) Burge *v.* Stroberg, 42 Ga. 89.

(3) Conner *v.* Henderson, 15 Mass. 319; Warren *v.* Wheeler, 1 D. Chip. (Vt.) 159; Wharton *v.* O'Hara, 2 Nott. & M. (S. C.) 65.

(4) Lewis *v.* Rountree, 78 N. C. 323; Martin *v.* Maxwell, 18 Mo. App. 176; Gatling *v.* Newell, 9 Ind. 572; House *v.* Foster, 4 Blackf. (Ind.) 293.

(5) Beresford *v.* McCume, 1 Sup. Ct. R. 50.

(6) Weybrich *v.* Harris, 31 Kan. 92.

(7) Kent *v.* Friedman, 101 N. Y. 616.

(8) Poland *v.* Miller, 95 Ind. 387; s. c., 48 Am. Rep. 730.

(9) Beane *v.* Tinkham, 14 R. I. 197.

(10) Nauman *v.* Overlee, (Mo.) 3 S. W. Rep. 380; Ottowa Bottle and Flint Glass Co. *v.* Gunther, 31 Fed. Rep. 208.

(11) Thorenson *v.* Minneapolis Harvester Works, 29 Minn. 341; Wigtins *v.* Hunter, Harp. (S. C.) 80.

(12) Cahill *v.* Smith, 101 N. Y. 355.

(13) Hersey *v.* Long, 30 Minn. 114.

§ 60. **When Action Does Not Lie for Breach.** A reasonable compliance with the conditions precedent, in a contract of warranty, is essential, before it can be enforced against the warrantor;[1] and if, in the action upon a warranty, one party thereto affirms the existence of the warranty, and the other denies it, there be-

ing no other evidence, the action must fail.[2] Nor can relief be found in an equity action, for, in the absence of fraud, chancery has no jurisdiction to decree relief on a warranty.[3]

Where a purchaser of goods, which were warranted, but which proved to be of an inferior quality, gives no notice to the vendor, but sells the goods at a reduced price, he thereby elects to abide by the contract, and is deprived of his remedy against the vendor to recover the difference in price.[4]

If the contract be for the purchase of machinery, with a warranty that it is in perfect order, and the vendee puts it in operation with full knowledge that it is defective, he is not entitled to recover damages for the breach of warranty.[5] And if the vendee had directed how a machine should be constructed, the vendor is not liable for its defective operation.[6] Nor is he liable for the want of parts of the machine, which the vendee undertook to furnish himself if needed. Where the sale is with a warranty that the article would not break in a year, and if it did, the warrantor would remake it, no action can be maintained upon the warranty without notice of breakage and neglect to remake.[7]

An action will not lie on an express parol warranty of soundness, where the vendee takes a written warranty of title, omitting the warranty of soundness.[8] For there can be no action on a parol warranty of any kind, where there is a bill of sale or agreement in writing respecting the sale.[9] Nor can an action be maintained on a warranty made after the contract of sale had been entered into,[10] unless there be a new consideration to support the warranty.

(1) Nichols *v.* Hail, 4 Neb. 210.
(2) Raines *v.* Totman, 64 How. (N. Y.) Pr. 493.

(3) Sypert *v.* Sawyer, 7 Humph. (Tenn.) 413.
(4) Rutter *v.* Blake, 2 Har. & J. (Md.) 353.
(5) Nye *v.* Iowa City Alcohol Works, 51 Iowa, 129.
(6) Archdale *v.* Moore, 19 Ill. 565.
(7) Hill *v.* Bannister, 8 Cow. 31.
(8) Wood *v.* Ashe, 1 Strobh. (S. C.) 407; Mumford *v.* McPherson, 1 Johns. (N. Y.) 414; Wilson *v.* Marsh, 1 Johns. (N. Y.) 503.
(9) Mumford *v.* McPherson, 1 Johns. (N. Y.) 414; Wilson *v.* Marsh, 1 Johns. (N. Y.) 503.
(10) Erwin *v.* Burke, 3 Murph. 241.

§ 61. **Measure of Damages.** In an action for breach of warranty, the measure of damages is the difference between the value of the article as represented and as it actually proves to be, and the purchase price is prima facie its value as warranted.[1] And a vendee who accepts and uses an article, purchased with a warranty, does not thereby waive his right of action for damages, but is entitled to recover for the breach of warranty the difference between the values of the goods in their damaged and undamaged condition.[2] If, however, the vendee elect to rescind the sale, on the failure of the vendor to pay back the purchase-money, after due notice of the non-acceptance of the goods as not being of the quality warranted, he may resell the goods, and recover of the vendor the loss upon the resale and all proper expenses, but not for the loss of a good bargain.[3] If the action is for a breach of warranty of title, express or implied, damages can only be recovered for the actual loss.[4]

No special form of pleading seems to be necessary, and a general allegation of damages is sufficient to admit proof of general damages, or such as necessarily accrue from the breach of warranty.[5] If the action be for the breach of warranty in the sale of a machine, all evidence of what it would cost to supply the defect in the machine is admissible,[6] and the expenses of the vendee in trying to make it work are

recoverable as damages.[7] In action for damage by reason of the purchase and sowing of plantain seed, upon the representation that it was clover seed, the measure of damages would be the difference in value of the seed, and the injury to the land by the sowing.[8] Prospective profits can never be considered,[9] but where there was a failure of crop owing to the worthless character of seed sold with a warranty, expenses in preparing the seed for planting and sowing have been recovered in addition to the price of the seed.[10]

In the absence of fraud, or bad faith, the proper measure of damages, in a suit by the vendee of a safe, against the makers, who warranted it "burglar proof," is the difference between the value of the safe as it was, and what it would have been worth if it had been as represented; and not the damages sustained in the loss of valuables taken out of the safe by burglars, who effected an entrance into it. To constitute a fraud, in such case, which will authorize recovery for the value of articles lost, there must be something more than mere assertion that the safe was burglar proof, there must have been an assertion as a fact of that which the seller knew to be false; or a reckless affirmation that the safe was burglar proof, whether the assertion was true or false; or a knowledge on the part of the vendor that the safe was not burglar proof, and a failure to communicate that knowledge, when the vendor knew that the vendee was contracting for the safe as burglar proof, and the vendee, trusting to those representations, must have been deceived by them. When, in such case, the sale was made by an agent, and the suit is against the principal, damages resulting from the loss of valuables in the safe can not be recovered, unless it

be shown that he was a guilty participant in the agent's fraud.[11]

Where material sold for manufacturing purposes, and warranted to be of a certain quality, proves, upon manufacture, to be of a quality inferior to that warranted, the measure of damages is the difference between the value of the defective article, made from the defective material furnished, and the value of the article if made from the material as warranted.[12]

(1) Gibbs & Sterritt Mfg. Co. *v.* Kaszezyke, 18 Ill. App. 623; Minneapolis Harvester Works *v.* Bomallie, 29 Minn. 373; Edwards *v.* Collson, 5 Lans. (N. Y.) 324; Wells *v.* Setwood, 61 Barb. (N. Y.) 238; Beresford *v.* McCune, 1 Cin. S. C. (Ohio) 50; Birdsall *v.* Carter, 11 Neb. 143.
(2) Reynolds *v.* Palmer, 21 Fed. Rep. 433.
(3) Gifford *v.* Betts, 64 N. C. 62.
(4) O'Brien *v.* Jones, 91 N. Y. 193.
(5) Meacham *v.* Cooper, (Minn.) 30 N. W. Rep. 669.
(6) Wheeler & Wilson Mfg. Co. *v.* Thompson 33 Kan. 491.
(7) Whitehead & Atherton Mche. Co. *v.* Ryder, 139 Mass. 366.
(8) Fox *v.* Emerson, 27 Hun (N. Y.), 355.
(9) Jones *v.* George, 56 Tex. 149; s. c., 42 Am. Rep. 689.
(10) Butler *v.* Moore, 68 Ga. 780; s. c., 45 Am. Rep. 508.
(11) Herring *v.* Skaggs, 62 Ala. 180.
(12) Park *v.* Morris & Co., 41 How. (N. Y.) Pr. 18.

Article 14.—Special Cases.

§ 62. Warranties of Agricultural Implements.

§ 62. **Warranties of Agricultural Implements.** No class of warranties has been so fruitful of litigation as that of agricultural implements; so varied have been the rulings of the courts, that we can not hope to so group them as to arrive at a harmonious conclusion, and thus present a resume of the fixed law on this subject.

The warranty may be oral or written, but, in almost every case, the warranty is printed on the back of, or otherwise made a part of, the contract of sale. If printed on the back of the contract of sale, or or-

der, it becomes a part of the contract of sale, even though the blanks are not filled out, and it is not signed, except by the printed name of the vendor. Even the delivery by an agent, authorized to make sales, of a printed warranty of the quality of a harvester, with the name of the warrantor printed thereon as a signature, would be binding as a warranty, though, upon the margin thereof, there is a condition printed that it shall be void unless countersigned by an agent, and no agent has countersigned it.[2] But where the contract of warranty, executed in duplicate, contains a provision that no agent has authority to change the warranty, it is notice to the vendee of a limitation upon the authority of the agents of the vendor, and that they can not waive or dispense with an express condition of the contract.[3] Where the written warranty has been delivered and accepted, no evidence can be properly introduced of an oral warranty, either in substitution of, or in addition to, the written warranty.[4] But where the vendee, being unable to read, is induced by the fraudulent representations of the vendor's agent to sign a written order containing a warranty differing from an oral one previously made, evidence of the oral warranty and the agent's fraudulent representations would be competent as tending to show that the written order never became operative as a contract.[5] The representations, by the vendor of a threshing machine, that it is a very good machine, and will do good work, do not, however, amount to a warranty.[6]

In an action upon a warranty of a machine, the vendor must show in what particular the machine failed to work.[7] And if the sale be with a warranty that if the harvester were not as good as another

specified kind, the vendee could "bring it back and get the money back," he can not rescind the sale without proving that it was not so good, and that he had returned it, not that he had tendered it, subject to order.[8] Evidence as to how other machines of similar pattern worked, is inadmissible to prove that the one in question worked as it was warranted.[9] But where the question at issue is, whether or not a machine was defective in its operations by reason of a fault in the plan or design of its construction, evidence is admitted to show that other machines, exactly like that in question, worked well, under the same conditions.[10]

Where the vendor of a harvester warranted it to do as good work as one owned by the vendee's brother, and there was nothing in the contract of sale requiring the vendee to notify the vendor of the failure of the machine to do good work, or to return it in that event, the vendee was not bound to return it; and, having notified the vendor that it did not work well, his continuing to use it while the vendor was trying to repair it, did not amount to an acceptance; and, the harvester failing to do good work as warranted, no liability attached.[11] If, on a sale of a machine, the vendor not only warranted it, but expressly agreed that if it failed to work as warranted, he would furnish a new one or return the notes given for the purchase-money, the vendee may elect to rescind the sale, and have his notes returned,[12] but he must notify the vendor, within a reasonable time, of his election to rescind.[13] If the vendee is to have one day in which to give the machine a fair trial, he will not escape liability on the ground that, on the day of trial, it did not fulfill the warranty, if the evidence shows that he failed to operate the machine

with diligence and care.[14] Or, if the cutting of five acres of grain with the machine, by the terms of the contract, was to be conclusive evidence that the warranty was fulfilled, it is not material when it was done. It is sufficient to bind the vendee, even though the five acres were cut only after two or more trials, and the vendor had been notified of the failure of the machine to comply with the terms of the warranty.[15]

Where a machine is sold on a conditional warranty, which expressly provides that the vendee shall have a certain time in which to test the machine, and, if it fails to fulfill the warranty, the vendee shall give the vendor written notice, stating wherein it fails; the vendee, to avail himself of the benefits of the warranty, must render substantial compliance with the agreement; and if no written or actual notice was given, and there was no waiver of the condition, the warranty can not be enforced against the vendor.[16] A warranty of a self-binding harvester covers both the binding and cutting apparatus,[17] and if the sale be of a combined reaper and mower, the vendee is not bound to give notice of defects until he has tried it both as a reaper and mower.[18] Where the warranty provides that the keeping of the machine during harvest, whether kept in use or not, without giving notice of defect, should be deemed to be conclusive evidence that the machine fills the warranty the term "harvest" means the usual harvest season, and does not include the time of cutting a second crop.[19] But, it appearing that the machine failed to work on starting the first season, that the vendee at once gave notice, that the vendor failed to put it in order, that the vendee gave notice of the continuing failure, and that the vendor

tried again to repair the machine, but failed, it was held that keeping the machine beyond the first season was not conclusive evidence that it filled the warranty.[20] If, however, the testing time be extended, by parol, the vendee must give notice at the end of the extended time.[21]

The condition, in a warranty, that, on discovery of any defect, written notice should be given the vendor, can not be waived by an agreement by a subagent of the vendor to give the notice.[22] Nor is oral notice to an agent of the vendor, who happened to be in the vicinity, sufficient.[23] But a voluntary examination by the vendor's agent, and his attempt to repair the defect,[24] and the presence of vendor's agent when the machine broke down, have each been held to be actual notice of defect, and therefore sufficient.[25]

If, in addition to requiring the vendee to give notice of the defect, the warranty requires him to render friendly assistance in repairing or replacing the defective part,[26] or requires him to return the machine,[27] there must have been a substantial compliance therewith. But where the vendor and his agent reside and have their places of business in different places, the warranty being silent as to the manner and place of delivery, in case the machine should be defective, the court will not hold the vendee under obligations to deliver the machine to the vendor or his agent, at the place of residence of either.[29] If the vendee use the machine nearly a whole season,[30] or for nearly a year,[31] where the warranty was to be in force for that time, before offering to return it, he is not entitled to rescind the contract of sale on the alleged ground that it did not work as warranted. Or, if he retain the machine, without

complaint, for any considerable length of time, there being no limit of time provided in the contract, he would be estopped from rescinding the contract, or claiming damages, and would be liable for the price.[32]

The vendee of a machine, who has given his note for the price thereof, may recover against the vendor for breach of warranty, although the note is still unpaid.[33] And the execution of notes,[34] or the giving of collateral security to secure their payment,[35] or part payment of the purchase-money,[36] subsequent to delivery and trial of the machine, will not amount to a waiver of defects therein, where the vendor at the time promised and agreed to repair the machine. But the execution of renewal notes for a threshing machine, has been held to be presumptive evidence of waiver of a claim for damages for breach of warranty.[37] If there is an actually existing breach of the warranty, the renewal of purchase-money notes would not amount to a waiver.[38]

If the vendee, at the time of the purchase, knew of the defects,[39] or examined the machine,[40] there being no fraud on the part of the vendor, he can not afterward, on account of the breach of the warranty, rescind the contract and return the machine, in the absence of any agreement to that effect.

In an action for breach of warranty, the measure of damages is the difference between the value of the machine as represented and as it actually proves to be, and the purchase price is prima facie its value as warranted.[41] The fact that the vendee gave his note in settlement for a machine, will not affect the extent of the damages, the amount of damages not being limited by the price he paid, or agreed to pay, for the machine.[42] The expenses of reasonable changes to

make the machine work may be shown,[43] but the vendee can not claim damages for time and expenses incurred in experimenting with the machine after it proved defective.[44] Injury to vendee's grain from delay in harvesting, while he was experimenting with the machine, and trying to make it work, are not elements of damages.[45] If the machine is warranted to do as good work as other machines, evidence is properly received showing a comparison between the work of other machines and the one in question. Evidence of the working of the machine in question, for several harvests, is also admissible to show its intrinsic defects, and that, after a thorough trial, it was not as warranted.[46] In the case of D. M. Osborne & Co. *v.* Ehrhard,[47] a negotiable promissory note, given in settlement for a machine, was negotiated before maturity, and the machine, proving defective was returned to the vendor. The holder of the note brought suit thereon, and the vendee, believing that the transfer was not bona fide, employed counsel to defend, but was not successful. In his subsequent action against the vendor, it was held that the defense against the note was judicious and apparently necessary, and that expenses of counsel were a legitimate consequence of the wrongful action of the vendor, the machine having been sold upon the condition that if it failed to do good work, and the defects were not remedied by the vendor, the vendee's note would be returned him upon a return of the machine.

(1) Griet *v.* Cole, (Mich.) 27 N. W. Rep. 579.

(2) First National Bank *v.* Erickson, (Neb.) 31 N. W. Rep. 387.

(3) Furneaux *v.* Esterly, (Kan.) 13 P. Rep. 824.

(4) Nicholas *v.* Wayman, (Iowa) 32 N. W. Rep. 258; Sandwich Mfg. Co. *v.* Tindle, (Iowa), 33 N. W. Rep. 79.

(5) Esterly *v.* Eppelsheimer, (Iowa) 34 N. W. Rep. 846.

(6) Worth *v.* McConnell, 42 Mich. 473.

(7) Canton Bank *v.* McCann, 4 Ill. App. 250.

(8) Edgerly *v.* Gardner, 9 Neb. 130.

(9) Osborne & Co. *v.* Bell, (Mich.) 28 N. W. Rep. 841; Murray *v.* Brooks, 41 Iowa, 451.

(10) Paulson *v.* Osborne & Co., (Minn.) 27 N. W. Rep. 203.

(11) McCormick Harvesting Mche. Co. *v.* Cochran, (Mich.) 31 N. W. Rep. 561.

(12) Turnbull *v.* Seymour, 31 Minn. 196.

(13) McCormick Harvesting Machinery Co. *v.* Chesrown, 33 Minn. 32.

(14) Fuller *v.* Schroider, (Neb.) 31 N. W. Rep. 109.

(15) Bayliss *v.* Hennessey, 54 Iowa, 11.

(16) Furneaux *v.* Esterly, (Kan.) 13 P. Rep. 824; McCormick Harvesting Machinery Co. *v.* Hays, 89 Ind. 582; Nicholas *v.* Wayman, (Iowa) 32 N. W. Rep. 258; Aultman, Miller & Co. *v.* Stichler, (Neb.) 31 N. W. Rep. 241; Osborn *v.* Rawson, 47 Mich. 206.

(17) Tunnell *v.* Osborne, 31 Minn. 343.

(18) McCormick *v.* Bassal, 50 Iowa, 523.

(19) Wendall *v.* Osborne, 63 Iowa, 99.

(20) Osborne *v.* Marks, 33 Minn. 56.

(21) Lewis *v.* Hubbard, 1 Lea. (Tenn.) 436.

(22) Nichols *v.* Larkin, 79 Mo. 264.

(23) Nicholas *v.* Knowles, 31 Minn. 489.

(24) Flatt *v.* Osborne, 33 Minn. 98.

(25) McCormick Harvesting Machine Co. *v.* Embree, 94 Ind. 85; Acker *v.* Kimme, (Kan.) 15 P. Rep. 248; Sandwich Mfg. Co. *v.* Trindle (Iowa) 33 N. W. Rep. 79.

(26) Sandwich Mfg. Co. *v.* Feary, (Neb.) 33 N. W. Rep. 485.

(27) King *v.* Towsley, 64 Iowa, 75.

(28) Sandwich Mfg. Co. *v.* Trindle, (Iowa) 33 N. W. Rep. 79.

(29) Osborn *v.* Rawson, 47 Mich. 206.

(30) Morgan *v.* Thelford, 3 Ill. App. 323.

(31) Upton Mfg. Co. *v.* Huiske, (Iowa) 29 N. W. Rep. 621.

(32) Cash *v.* Giles, 3 C. & P. 407; Abbott *v.* Johnson, 2 N. W. Rep. 332; Nichola *v.* Hail, 4 Neb. 210; Miller *v.* Nichols, 5 Neb. 478; Pitts Sons Mfg. Co. *v.* Spitsnogle, 6 N. W. Rep. 71; Bayliss *v.* Hennessey, 6 N. W. Rep. 46; J. I. Case Threshing Machine Co. *v.* Vennon, 23 N. W. Rep. 563.

(33) Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341.

(34) D. M. Osborne & Co. *v.* Carpenter, (Minn.) 34 N. W. Rep. 163.

(35) Aultman, Taylor & Co. *v.* Hefner, (Tex.) 2 S. W. Rep. 861.

(36) Courtney *v.* Boswell, 65 Mo. 196.

(37) Aultman *v.* Wheeler, 49 Iowa, 647.

(38) Osborne & Co. *v.* Marks, 33 Minn. 56.

(39) McCormick *v.* Kelley, 28 Minn. 135.

(40) McCormick *v.* Sarson, 45 N. Y. 265; Scranton *v.* Mechanics' Trading Co., 37 Cal. 130.

(41) Minneapolis Harvester Works *v.* Bonallie, 29 Minn. 373. See also § 61, Measure of Damages.

(42) Frohreich *v.* Gammon, 28 Minn. 471.

(43) Melby *v.* Osborne, 33 Minn. 492.

(44) Aultman *v.* Stout, 15 Neb. 586.

(45) Wilson *v.* Rudy, 32 Minn. 256.

(46) D. M. Osborne & Co. *v.* Carpenter, (Minn.) 34 N. W. Rep. 163.

(47) D. M. Osborne & Co. *v.* Ehrhard, (Kan.) 15 P. Rep. 590.

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